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# THE AMERICAN LAW REGISTER

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## AN INQUIRY INTO THE NATURE AND LAW OF CORPORATIONS—PART I.

### *The Nature of a Corporation.*

As in all other inquiries, no satisfactory result will be attained until, as a basis of reasoning, a true definition is reached. What, then, is a corporation? Many definitions have been advanced and accepted, but no one yet advanced has been found to meet the exigencies of all corporate questions; no definition has been given to which the courts in all corporate cases have been able to refer as the basis from which to reason out the questions involved. On the contrary, the courts have usually been compelled to make a definition to suit the particular case in hand, rather than to decide the case according to any accepted definition.

It will be of interest to examine, first, several of the most famous definitions, and we will consider shortly three, each accepted for many purposes. These three are cited not only because they are among the very best ever advanced, but also because they are typical of the three classes into which, probably, all the definitions may be divided. Quoting them in



their chronological order: Mr. Kyd, in his well-known work on corporations, being almost the first English treatise on the subject, at page 13 of the introduction, says: "A corporation, then, or a body politic, or a body incorporate, is a collection of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, invested by the policy of the law with a capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence."

Chief Justice Marshall, in the *Dartmouth College Case*,<sup>1</sup> defines, or rather characterizes, a corporation as an "artificial being, invisible, intangible and existing only in contemplation of law."

Justice Field, in the case of the *Pembina Mining Company v. Pennsylvania*,<sup>2</sup> says with reference to private stock corporations: "Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name, and having a succession of members without dissolution;" thus evidently, in opposition to the definition of Chief Justice Marshall, reverting more or less to the definition first given by Mr. Kyd.

These definitions all contain truth, but a little thought will show that not one of them is satisfactory or complete. A corporation is evidently in one sense, as said by Justice Field, composed of persons, since in a sense it cannot be composed in any other way; but, as evidently, it is something more. A, B and C may compose a corporation, as if, for instance, they are the incorporated trustees of a university; but, as evidently, the university of which they are such trustees is in the law something more than the association of the three, since it is something separate and distinct from each and all of them.

<sup>1</sup> 4 Wheaton, 636 (1819).

<sup>2</sup> 125 U. S. 189 (1887).

This fact is equally plain when we consider corporations less simple in their nature than eleemosynary bodies. Take commercial stock corporation, with reference to which Justice Field gives his definition. Of what persons is it composed? If it is an aggregation of persons, of what persons? Justice Field and the other jurists, who have advanced similar definitions, would, we may assume, answer, "the stockholders." But in such answer they would disagree, not merely with Chief Justice Marshall, who ably treats of this particular subject in his dissenting opinion in the case of the *United States Bank v. Dandridge*,<sup>1</sup> but will also put themselves in opposition to certain corporate facts.

A corporation is only an aggregation of stockholders, in the sense that they are the ultimate owners of its property. The word ultimate is used advisedly, because they possess no actual existing legal interest therein whatever; and even in a case of dissolution, when their actual legal rights first accrue, such rights are not primary, but are entirely subsidiary to the rights of all persons who have claims resulting from the action of the corporation itself. The stockholders are in the position of the heirs, or next of kin, or residuary legatees of a living person. Their legal rights only vest upon dissolution, and then entirely subject to the contracts and obligations of the late corporation. A private stock company, indeed, exists primarily for the benefit of its stockholders, who, therefore, have certain equitable rights to prevent the waste of its assets and, subject to the discretion of the directors, have certain rights to share in its profits, and, upon its dissolution, as already suggested, are in the position of residuary legatees of its assets; but in no other sense can they be said to compose the corporation.

Going a step farther, the absurdity of treating the stockholders as a corporation becomes even more apparent. If they were, for all purposes, the corporation, they would certainly exercise its powers, its functions; but, in fact, they do not, and cannot so do. Such powers are exercised by the directors. When the directors, in their corporate capacity,

<sup>1</sup> 12 Wheaton, 113 (1827).

act, the corporation acts, and not otherwise. In certain cases, to be sure, the stockholders are given, by statute, a certain control or veto power over the action of the directors; but, except under such statutes, for the purpose of using the corporate property, for the purpose of exercising the corporate franchise, in which user the legal title thereto is certainly found, the directors and not the stockholders are the corporation. The stockholders, indeed, usually elect the directors, but such accidental fact cannot affect the question one way or the other.

Apparently, therefore, Chief Justice Marshall was entirely right in the case of *United States Bank v. Dandridge*, in the opinion that, in so far as a stock corporation is an aggregation of individuals, it is composed rather of its directors than of its stockholders, since they not only can, but are the only persons who can, use its property, exercise its functions and act in its name—the stockholders being merely the ultimate distributees of its property and profits. If we endeavor to apply Justice Field's definition to other than private stock corporations, of which he was speaking, its inadequacy becomes all the more apparent; and this application should certainly be a fair test, since we all realize that the corporate conception, the corporate idea, which distinguishes corporations from other persons known to the law, exists in all corporations. Public and private corporations differ only in their purposes—otherwise they are identical legal entities, and any true definition necessarily includes them both.

Who, then, according to the definition of Justice Field, would compose a municipal corporation? In one sense in which a private corporation may be said to be composed of its stockholders—that is, in that they are the ultimate owners of its assets—the municipal corporation would be said to be composed of its taxpayers; while in another sense in which a private corporation may be said to be composed of its stockholders—that is, in that they elect the directors—the municipal corporation would be composed of the voters. But in the sense in which a private corporation is more properly said to be composed of its directors—in that they are the



persons who use its property and exercise its functions—a municipal corporation would evidently be composed of the various persons or boards who are authorized by its charter to exercise its various functions. For most purposes it would apparently be composed of the mayor and city council; for others, however, it might be composed simply of the city chamberlain; or for others of special boards, such as water boards, park boards, or the like, provided such boards were authorized to exercise any of the corporate functions in the corporate name. Likewise an eleemosynary corporation, such as a college, if simply an aggregation of persons, would be composed, for various purposes, of aggregations of various persons. For some purposes a college may be said to consist of all persons connected with it, whether students or professors. For most purposes it is usually, under its charter, composed of its trustees; but for others, again, its charter may compose it of its faculty—or even, indeed, of its alumni—if by such charter, as is sometimes the case, such various bodies are authorized to act for various purposes in the name of such corporation. For any particular purpose, indeed, a corporation, in so far as it is an aggregation of persons, is composed of those persons who are authorized to act in its name for such purpose; and hence the confusion resulting from the attempt of various jurists to define a corporation as an aggregation of any special set of persons. Plainly, indeed, therefore, a corporation is more than an aggregation of persons, being a legal entity composed for each special purpose; of various persons, indeed, but of different persons for different purposes; and Chief Justice Marshall was entirely right in his statement that, independent of all natural persons connected with it, a corporation is in itself “an artificial being, invisible, intangible, and existing only in contemplation of law.” Yet, at first sight, this characterization conveys to our minds no definite idea, and would seem to be a mere metaphysical subtilty of no particular utility. But further reflection and inquiry will show that this existence of a corporation as a legal entity, as an artificial person, is a practical fact, founded in the very nature of the law itself.

The common law, properly speaking, deals not with persons, but with their rights and duties. A, B and C may, indeed, be living persons, but are not, as such, recognized and known to the law, but only through their right to do, or their obligation to refrain from doing, this or that act. So long as their rights are not infringed, nor they infringe the rights of others, the law takes no note of them; it simply protects their rights and compels the performance of their duties. The law, indeed, may be said to consist of the rights and duties of persons as enforced by the state; or since, as is well known, duties are but complementary to rights—it being the duty of every person to recognize and submit to the rights of others—this definition may be further modified, and the law may be simply said to consist of the rights of persons as enforced by the state.

Such being the nature of the common law, it follows, as already suggested, that individuals exist in the law, not as persons of flesh and blood, but merely as the subject of certain general and special rights, with the corresponding duties and penalties. We say rights general and special, because, with reference to general rights of persons and of property, they are divided into classes—such as men, women, infants and corporations—each class being the subject of certain general rights; while it is with reference to their special rights, which grow out of the exercise or breach of their general rights, that the individual members of these classes are distinguished one from another—as, for instance, the right to purchase and hold property is predicated of all men of legal age, not *non compos mentis*, while the right to purchase or own an individual piece of property is predicated only of a person undertaking to exercise this general right, and then serves to distinguish him from all other persons of his class. In contemplation of law, therefore, a person is but the subject of certain rights, duties and penalties; and, conversely, it follows that if such rights, duties or penalties are predicated of an imaginary being, vested with a name, such imaginary being, by such name, as a subject of such rights, duties or penalties, will immediately exist in contemplation of law as an artificial person.

That this is the true nature of the law, and the true position of persons with regard thereto, is made manifest not merely through the analysis thereof, but also by the consideration of some legal phenomena. We will assume, for example, that Richard Roe, the subject of the general rights of property—and, in addition thereto, the subject of the special rights connected with the ownership of the estate of Black Acre—dies, unknown to anyone at home, in a foreign country. Although he is actually dead, no longer existing in flesh and blood as a natural person, in the absence of all proof to that effect whereby by the action of the law his property rights will devolve upon other persons, he still continues to exist, in contemplation of law, as the subject of such rights. He will still, in contemplation of law, be an existing person, not only as the subject of the general rights of the property predicated of all persons, but also as the subject of the special rights flowing from the ownership of the estate of Black Acre. It may be that on account of his actual death he may not practically be able to exercise all of the property rights predicated of him, but this would equally be the case if he were simply absent and without representation, while he would still be able, although dead, through his agents, to collect the rents from his estate, and to that end, or the purpose of punishing or preventing trespass, or maintaining any other property right connected therewith, to instigate and conduct actions in law and equity; and, as the owner of such estate, he will be held, although dead, liable in the law for the improper or illegal acts of his servants and agents in the administration thereof. Indeed, further than this, if his agents are in the possession of the necessary funds or credits, he will be permitted, in the exercise of his general property rights, to purchase and become the owner of other and additional property, real and personal. As a subject, therefore, of these various rights, duties and penalties, he continues in contemplation of law an existing person; even though in fact dead.

Similarly suggestive is the reverse doctrine known as civil death, almost obsolete, but still illustrative of this peculiar character of our law. According to this doctrine a person

still living, but convicted of certain penal offences, thereupon becomes, in contemplation of law, divested of all his property rights, and, therefore, in the eye of the law, although actually living, dead. This death in the law is not and never has been, in fact, complete, although in old times it used to be assumed so to be, because, while ceasing to exist as a subject of the general property rights, such convicted person still continued to live as the subject of certain personal rights, duties and penalties.

We have also the similar case of a living person, whose property rights, after an unexplained absence of several years, have by the action of the law devolved upon a successor, and who, therefore, although living in fact, becomes dead in the law. Such legal death is evidently not, as is generally assumed, the cause, but is, as a matter of fact, simply the result of the necessity of transferring the property rights of a living person to a successor.

The case of a corporation is analagous to the first illustration above given of a person actually dead, but still existing in the law as the subject under his own name of certain rights, duties and penalties. If certain rights, duties or penalties are predicated of anything, metaphysical or otherwise, or predicated of any or of various persons, but under some special name giving the subject thereof an identity, such thing, such being, such person or aggregation of persons known by such name, becomes and is in contemplation of law, as the subject of such rights, duties or penalties, a person—an artificial person indeed—but, nevertheless, as much a person as any living man. Such artificial person or corporation like the dead person already cited, not possessing the natural faculties, can, of course, only exercise its rights, perform its duties, through natural agents, that is, through natural persons in the exercise of their legal rights; but its rights are in no sense predicated of these agents or any of the various persons or aggregations of persons who may be said to compose the artificial person, but of it under its own name; the artificial person being under its own name the subject of such rights, duties and penalties, and in truth and fact, just as much a person



in contemplation of law as they. But, as already suggested, corporations are not the only artificial persons existing in the law. On the contrary, it is evident that whenever the law predicates rights and duties of any thing, being or person, except of a natural person as such under his own name, an artificial person exists. Trustees, executors and receivers are all examples of such artificial persons. They are in no sense agents, exercising the rights of their principals but are, in fact, in the law, distinct persons, distinct, indeed, from their own natural persons, as they exist in the law as the subject of an entirely different set of special rights and duties from those predicated of them under their own names. Natural and artificial persons, to be sure, exercise these rights and perform these duties through the same natural faculties, just as directors of a corporation, whether acting as the corporation, or as partners in a different business would act through the same natural faculties, but natural and artificial persons so acting are in no sense identical except in the unimportant identity of the natural agencies through which they act, and, therefore, only to the same extent as two corporations, with identical boards of directors ; or two trustees, filled by one and the same natural person ; while they are often almost identical in every important respect with some *other* artificial or natural person. A receiver of a corporation, for instance, is in many respects identical with the original corporation ; an executor with his testator ; and in almost every respect a trustee, a receiver, or an executor with his predecessor or successor in such position.

Artificial persons are, therefore, just as real in the law as natural persons, and exist as such entirely independent of the natural persons, who must, in the very nature of things, exercise their rights and perform their duties. It would seem at first sight, indeed, as if it might be said that, in contemplation of law, there was not in reality any distinction between artificial and real persons ; that a natural person was, in contemplation of law, artificial ; and, that a natural and an artificial person were, in contemplation of law, different artificial persons, whose rights were exercised by the same natural

person. But this is not true. An artificial person is a separate and distinct legal conception, as such the person exists but as a subject of property rights, while of the living person the personal rights of life and liberty are also predicated. A trustee, as such, possesses none of the rights of persons and, therefore, for instance, cannot maintain an action for assault; likewise a corporation, although its functions are exercised by natural persons, possesses in itself no rights of persons and, therefore, cannot maintain actions for the breach thereof.

But, to revert to our definition; to characterize a corporation as an artificial person is not, therefore, to deal in metaphysics or in subtile concepts, but is simply to state a legal fact of the greatest practical importance, which fact at once establishes the status of corporations and furnishes a basis upon which, necessarily, all the doctrines of corporation law must stand. But the definition is not yet complete; it yet remains to distinguish corporations from other artificial persons.

We have found a corporation to be an artificial person existing, in contemplation of law, as a subject of certain, as yet undefined, property rights, but that is no more than to say that a corporation is an artificial person, since, as we have already found, all artificial persons exist, in contemplation of law, as the subject of certain property rights. The absence of the rights of persons we have found to distinguish artificial persons from natural persons. Are, then, as would seem to be the intendment of Mr. Kyd's definition, corporations to be distinguished from other artificial persons by the peculiar property rights predicated of them? Of what property rights, then, is a corporation the subject, or, to reverse the question, what property rights cannot be predicated of a corporation? Apparently none. In the absence of special limitations, its absolute rights are but those property rights characteristic of all persons. As a person existing in law, a corporation may sue and be sued, buy and sell real and personal property, make contracts, and, through its failure to observe its complementary duties, may break contracts, commit torts and may be held in the law accountable therefor; as, indeed, may all

artificial persons ; in fact, in the absence of special limitations imposed by statute or by public policy, the law simply recognizes artificial persons as the subject of the general property rights, although, of course, such rights have to be exercised in the manner provided by law. A corporation need not possess every property right, but it may possess any property right and, therefore, cannot be distinguished from other artificial or natural persons by any peculiar property rights of which it may be the subject. Mr. Kyd's definition, therefore, is evidently not satisfactory.

Similarly with reference to the purposes for which a corporation may exist. Corporations usually, if not invariably, exist for some defined purpose, but the purpose may be general or special, may be charitable, political or commercial, or, as may well be conceived, a corporation might exist simply as a person, not for any special purpose, but merely to enable certain natural persons to exercise all the rights of property as an artificial person under an assumed name *for any legal and proper purpose*. Such a corporation, it is not believed, has ever existed, but evidently such an artificial person might readily be, by statute, created or authorized, and, if created or authorized, would as evidently be a corporation in every sense of the term. Other artificial persons can apparently be more properly, although not completely, defined with reference to their purposes ; as, for instance, a trustee can only exist for the purpose of exercising property rights for the benefit of another or other persons ; or, a receiver to conceive property rights in litigation, but a corporation can exist as well for these purposes as for any or all others.

The peculiarity of a corporation, therefore, is evidently not to be found in the purpose or purposes, general or special, for which it may be created or authorized. In what then does its peculiarity consist? Mr. Kyd, in his great work, page 70, expanding his definition, states that three capacities alone are sufficient to the *essence* of a corporation.

1. To have perpetual succession under a special denomination and under an artificial form.
2. To take and grant property, to contract obligations and

to sue and be sued by its corporate name in the same manner as an individual.

3. To receive grants of privileges and immunities and to enjoy them in common.

All will recognize that the possession of these three qualities would constitute a corporation, but these last two qualities or capacities are in nowise peculiar to corporations but are possessed by all persons, natural and artificial. All persons, including corporations, by virtue of their recognition as such, can take and grant property, can receive grants of privileges and immunities, and as for enjoying the latter in common, a corporation no more than any other person does that. These two last qualities, therefore, in no sense distinguish or define a corporation, being simply predicated of it as of all other persons; leaving for its only peculiar quality the first mentioned by Mr. Kyd, viz., the capacity of perpetual succession under a special denomination and under an artificial form, or, as it is more commonly put, the capacity of succession under an assumed name. It is not meant by this that a corporation must have perpetual succession, but merely that it must possess the capacity for such succession if actual persons exist with power to exercise its functions. Any corporation may cease to exist by the death of all persons authorized to so act, but, nevertheless, a corporation is not so bound up with the identity of an actual person that, upon the death of the latter, the former necessarily ceases to exist. The corporation exists under an assumed name which continues to represent its property rights regardless of the succession of persons, who may exercise them or reap the benefit thereof, and, therefore, it, under such assumed name, is capable of, or has the capacity of, succession.

This capacity of succession, indeed, like its general property rights, would seem to flow from, to be but a legal incident of, the legal recognition of a corporation under an assumed name. As an artificial person recognized at law under such assumed name, its existence is evidently independent of the existence of the persons who exercise its powers and therefore solely by virtue of such assumed name it is capable of, although for lack

of means to select successors to its original corporators it may not be actually vested with, perpetual succession.

A comparison between corporations and other artificial persons will make this plain, and will, at the same time, show that it is this one quality alone which distinguishes them from each other. Let us note the differences between a charitable corporation, or an incorporated board of trustees for a charitable purpose and an unincorporated trustee or board of trustees. They resemble each other in many respects—they are both artificial persons existing for the general purpose of holding and administering a trust fund—wherein then do they differ? The trustee exists in the law as the subject of special property rights and duties, not attributed to him as a natural person or as an individual, but yet such trustee being known in the law by the same name as the natural person exercising the trust powers, his conventional legal existence is entirely dependent upon his continued existence as an individual. When the individual dies, the trustee dies also, though the law may immediately resurrect him in the successor in the trust. The death of the former is actual and final; there is no successor to his rights and duties, and he as a subject thereof ceases to exist; the death of the latter is conventional—no sooner dead, than, in his successor, he again lives, a subject of the same rights and duties, differing in nothing except in name; if the courts had seen fit to authorize an individual trustee to act as such under an assumed name, upon his death, evidently the trustee as such would not have died, but would have continued to exist under the same name and with the same legal identity in the successor in the trust. In other words, such conventional trustee, existing in the law under an assumed name and therefore possessing under such name the capacity of succession would, in fact, be a corporation sole. And in the case of an unincorporated board of trustees this is all the more plain. We have but to assume the legislature to confer upon A, B and C, trustees, the right to so act under an assumed name to immediately convert such individual trustees into a corporation, the capacity of succession immediately resulting, if not by the terms of the trust or from the act of legislature,

then from the inherent power of courts of equity to appoint successors in trust. That this capacity of succession under such assumed name is likewise the one unique quality of a private corporation having capital stock, is evident from a comparison with common law joint stock companies. The common law, as is well known, recognized the right of individuals to associate themselves together for the purpose of carrying on an enterprise, commercial or otherwise, with a fixed capital divided into transferable shares and free from any further individual responsibility whatever. But it was simply a matter of contract, if the shares were issued and subscribed for thereunder, the law would enforce it as between parties thereto; but as to others than parties, such contract was, of course, not binding. The law recognized the contracts made in behalf of such association by its agents and the various rights and duties flowing therefrom, but it did not predicate such rights and duties of an artificial person existing under the name of such association, and they could not be enforced in its name. On the contrary, the common law predicated such rights and duties of the various individuals composing the association, by and against whom, therefore, as individuals, all actions springing therefrom had to be brought. The managers of the association were but the agents of its members and, as such, could not make contracts unless properly so empowered, and such contracts, even if legally made, could not be at law enforced except at the proper suit of the various individuals on whose behalf they were entered into. The facts that the agents of the association were, by the contract between its members, in nowise authorized to pledge their personal credit, could not avoid their liability to third parties, unless the latter were also parties to such contract, since such members were, in fact, the principals and the very persons primarily responsible for the acts of their agents, the managers of the association. It was possible, therefore, at common law, for individuals to associate themselves together under a contract in all respects similar to the relation between the members of a stock corporation, and yet such association thus formed had no standing in court. It could neither sue nor be sued, take nor grant

property, except in the name of its members, while the latter, as individuals, remained fully liable for the contracts of their agents, unless such contracts expressly provided to the contrary. As the persons composing such association had no right to act in its name, it in contemplation of law simply did not exist.

But, if we assume the managers of such association to be authorized by the state to act independently under an assumed name, evidently an artificial person will at once exist in contemplation of law under such name, which can sue and be sued, buy and sell property, etc., will, in fact, be in every sense of the word a corporation. It may seem strange that, in creating a corporation, the state should but confer upon certain persons and their successors such an apparently simple right as that to act under an assumed name ; but, in fact, this right, simple as it seems to be, is entirely contrary to the very nature and definition of the common law. As already stated, such law consists of the rights of persons as enforced by the state. Duties are but complementary to rights, each right carrying with it its complementary duty, on the part of other persons, to observe it ; the breach of which duty again creates the right of redress.

It is this latter right of redress, this right to hold a person committing a breach of duty personally responsible therefor, which is the keystone of the entire system. The original right, indeed, may be said but to exist therein, and, therefore, the common law could not permit any person to evade or avoid such personal responsibility for breach of duty. The recognition in the law of other artificial persons, such as trustees, while seemingly an exception to, is in reality the best illustration of this principle. In a trustee the law does not recognize the right of an individual to avoid his personal responsibility for his acts, but, on the contrary, the trustee results from the recognition and enforcement by courts of equity of the duty of trustees to observe the rights of others. If any person has any right in and to property legally vested in another, to protect this right, and to enforce the duty to observe it on the part of the legal owners of such property, equity raises a trust ;



a trust being but the duty imposed upon a person holding property belonging to another to observe the rights of the latter. Except for this element of duty a trust could not exist. But, having thus imposed upon persons special duties, not simply to observe the rights of others, but often to exercise such rights for their benefit, in order to better protect such rights, and, also, as was plainly equitable, to relieve the trustee from his personal common law responsibility for their exercise, equity recognized in him as the subject of such rights, an artificial person.

The doctrine of trusts has been extended to many cases to which it properly has no application, but, nevertheless, it has never been admittedly summoned into court for other than the nominal purpose of enforcing duties, never for the admitted purpose of enabling persons to thereby avoid their personal responsibility for their own voluntary acts.

Plainly, therefore, since it was contrary to the primary principles of the common law to release a person from his individual responsibility for his act, the courts could not recognize the right of a person to act under an assumed name, and, therefore, could not recognize the existence of a corporation except by the expressed or implied authority of the state. Such authority is, therefore, in every case necessary to the existence of a corporation ; and, *vice versa*, as we have found in our inquiry, when by such authority persons are authorized to act under an assumed name, a corporation immediately results.

A corporation may then be defined as an artificial person, resulting, in contemplation of law, when one or more persons are expressly or impliedly authorized by the state to act under an assumed name.

*Henry Winslow Williams.*

Baltimore, October, 1898.

## GIFTS AND SALES OF INTOXICATING LIQUOR CONTRASTED.

A pure and simple gift of intoxicating liquor to one not a minor is not a criminal act,<sup>1</sup> except in jurisdictions where unusual legislation prevails. Indeed, there has been some casual question<sup>2</sup> whether the state has power to prohibit such gifts. Its power in this respect has been ably sustained in language worthy of recital: "We may here remark that, if the state has power to prohibit the sale of liquor, it has also power to prohibit the *giving* of liquor by one person to another. The evil to be avoided is the communication from one to another of an article which may be injurious to the recipient, or which, by its general use, may demoralize or harm the whole community. It is not attempted to restrain a man's private indulgence in drink. But that is because the law deals not with the isolated individual, but with men in their relations to each other. Upon the delivery of a noxious substance from one to another, a relation is established of which the law may take cognizance; and it is perfectly immaterial whether the transfer be by sale, barter or gift. The evil is not in the receipt of money for the article furnished, but in the furnishing of it. And so the authorities hold."<sup>3</sup> It is probable that such a law would not be construed to prevent a man from giving liquor to a guest in his own house, purely in the way of hospitality. But that is a question of interpretation, not of the power of the legislature."<sup>4</sup> The power, in fact, has been exercised in some states. In Vermont, the law prohibits the gift of intoxicating liquor, except at private dwellings or their dependencies, which have not become

<sup>1</sup> *State v. Hutchins*, 74 Iowa, 20 (1887); *State v. Standish*, 37 Kan. 643 (1887).

<sup>2</sup> *Holley v. State*, 14 Tex. App. 505, 516 (1883).

<sup>3</sup> Citing *Powers v. Comm.* (Ky.), 13 S. W. 450 (1890); *Altenburg v. Comm.*, 126 Pa. 602 (1889).

<sup>4</sup> *Black on Intoxicating Liquors*, § 39. See, also, *Wolf v. State*, 59 Ark. 297 (1894).

places of public resort.<sup>1</sup> The exception has not been construed by the court to allow other than genuine domestic use of the beverage. A farmer who treated at his barn and granary was convicted,<sup>2</sup> as was a citizen who gave away liquor in a room in which no business was conducted, but which was not his dwelling.<sup>3</sup> The use of the upper part of the building by others as a dwelling, in the latter case, was immaterial. The court has not sustained any invasion, however, of the rights or privileges of the head of a family or household to furnish them with such food or beverage as he judges fit and proper for their sustenance and refreshment. An innkeeper's domestic privilege is as free as is that of other citizens. Where a hotelkeeper treated his hostler at the bar, for caring for his horses through the night, it was held that he had not violated the statute.<sup>4</sup> For an employe may be an invited guest within such an exception, and it is immaterial whether he or the host suggests the treat.<sup>5</sup>

The Raines law, of New York, may be mentioned in this connection. It forbids persons to give away any food to be eaten on premises where liquor is sold. The law was held to be a proper exercise of power by the legislature, and not to deprive such persons of either liberty or property, within the meaning of the Federal or State Constitution.<sup>6</sup> Reference may be made also to statutes like that in Pennsylvania, prohibiting the "furnishing" of liquor on Sunday,<sup>7</sup> and to legislation in some states, as Kentucky and Arkansas, forbidding gifts of liquor within a specified time prior to election.

The authorities recited afford a decisive answer to the query of the Texas judge alluded to at the beginning of this paper.

Where the statute merely forbids sales, the statute does not

<sup>1</sup> Vermont Rev. L., § 3800.

<sup>2</sup> *State v. Camp*, 64 Vt. 295 (1891).

<sup>3</sup> *State v. Danforth*, 19 Atl. (Vt.) 229 (1890).

<sup>4</sup> *State v. Jones*, 39 Vt. 370 (1867).

<sup>5</sup> *Powers v. Commonwealth* (Ky.), 13 S. W. 450 (1890).

<sup>6</sup> *People ex rel. Bassett v. Warden City Prison*, 6 App. Div. (N. Y.) 520 (1890).

<sup>7</sup> *Commonwealth v. Heckler*, 168 Pa. 575 (1895).

apply to gifts.<sup>1</sup> This will not be carried so far, however, as to protect a scheming individual in any shift or device resorted to in evasion of the prohibition.<sup>2</sup> Even where the legislation prohibits gifts as well as sales, the law is understood to apply only to such devices. An act of hospitality, whereby a host gives drink to a guest at his table at his private house, is not a gift within such prohibition.<sup>3</sup> Construing an Iowa statute forbidding gifts and devices intended to evade the liquor law, the court said: "The section evidently requires the statute to be so construed as to forbid all gifts for a consideration, direct or indirect or remote, or made with the purpose of receiving anything in return. Thus, when liquor is given to those who buy other things, or to induce trade or attract custom, or in a hundred different ways which the ingenuity of lawbreakers has or may devise to defeat the law, it is to be regarded as a violation of the statute."<sup>4</sup> Similar construction has been given where the statute contains the word "disposition." All such legislation is aimed at traffic followed for a consideration, or motive of gain.<sup>5</sup> The Minnesota court said: "The giving away of liquor is certainly one method of disposing of it, and, in connection with the sale or traffic, is within the mischief sought to be remedied. . . . As

<sup>1</sup> *Williams v. State*, 8 South. (Ala.) 668 (1890); *Gillan v. State*, 47 Ark. 556 (1886); *Ward v. State*, 45 Ark. 351 (1885). Where the constitution of a state authorized the legislature to tender to localities a vote upon local option whether to prohibit the sale of intoxicating liquor, the legislature could not go further and extend the option to cases of gifts of such liquor. The constitution, in authorizing the more restricted question, impliedly prohibited the larger one: *Holley v. The State*, 14 Tex. App. 505 (1883); *Steele v. The State*, 19 Tex. App. 425 (1885).

<sup>2</sup> *State v. Standish*, 37 Kan. 643 (1887); *Palmer v. State*, 91 Ga. 164 (1891); *Marcus v. State*, 89 Ala. 23 (1889).

<sup>3</sup> *Comm. v. Carey*, 151 Pa. 368 (1892); *Cruse v. Aden*, 127 Ill. 231 (1888); *Albrecht v. People*, 78 Ill. 510 (1875); *Johnson v. People*, 83 Ill. 431 (1876); *Reynolds v. State*, 73 Ala. 3 (1883); *Black on Intoxicating Liquors*, § 39. And see opinion of Redfield, Ch. J., in *State v. Freeman*, 27 Vt. 520, 522 (1849).

<sup>4</sup> *State v. Hutchins*, 74 Ia. 20 (1888). And see *State v. Briggs*, 47 N. W. (Ia.) 865 (1891); *State v. Harris*, 64 Ia. 287 (1884).

<sup>5</sup> *Wood v. Oregon Ty.*, 1 Ore. 223 (1856); *Reynolds v. State*, 73 Ala. 3 (1882), where there is an excellent opinion by Stone, J. See *Comm. v. Herman*, 4 Pa. Dist. Rep. 412 (1895), charge of Yerkes, J.

remarked by the court in *State v. Adamson*:<sup>1</sup> "To prevent abuses that might flow from the unrestrained disposal of liquors, . . . it would seem that the giving away, under circumstances which might produce the same evil results as the selling, would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary 'incident' to a statute regulating the sale, to secure its efficient operation. . . . All experience under license laws proves this." In the case before them, that of a disposal of liquor by an unlicensed vendor, it appeared that the defendant was a saloon keeper, but that on the particular occasion complained of the liquor was furnished gratuitously.<sup>2</sup> His conviction and sentence were affirmed.

The main purpose of the legislation must be borne in mind, and this will lead to interpretations differing according to the circumstances. If a dealer in liquor were to give of his stock in store, his act would be considered as such "furnishing" or "giving away" as came within the prohibition.<sup>3</sup> The gift of a quart of intoxicating liquor was held to be a "furnishing," however it would be in the case of a social drink.<sup>4</sup> One who drove around electioneering on a Sunday, and who, for his personal comfort, carried with him a flask of liquor, out of which he gave drinks to those on whom he called without charge and solely to engender good feeling, was held not to be guilty of "furnishing on Sunday," under the Pennsylvania Act of 1887, prohibiting the furnishing, by sale, gift or otherwise, of intoxicating liquors on that day.<sup>5</sup> A druggist does not "furnish" whisky when he allows young men, who have "chipped in" and with the common fund bought elsewhere the liquor, to mix the whisky with the soda on his premises.<sup>6</sup> One, however, who buys intoxicating liquor with another's money, and takes it to him with the intention that the two will share, is guilty of "furnishing"

<sup>1</sup> 14 Ind. 296 (1860).

<sup>2</sup> *State v. Densting*, 33 Minn. 102 (1885).

<sup>3</sup> *State v. Freeman*, 27 Vt. 520 (1855).

<sup>4</sup> *Dukes v. Georgia*, 77 Ga. 738 (1886).

<sup>5</sup> *Comm. v. Heckler*, 168 Pa. 575 (1895); *Sterrett, C. J., dissenting*.

<sup>6</sup> *State v. Clark*, 66 Vt. 309 (1893).

same.<sup>1</sup> Where one takes a fund contributed by all and purchases whisky, and brings the liquor to an appointed place, where it is drank by all, he is not a vendor, according to what appears to be the better opinion.<sup>2</sup>

Delivery of liquor, to be paid for in kind, has been regarded differently in different jurisdictions. In Georgia<sup>3</sup> and in Massachusetts<sup>4</sup> it is not punishable as a sale, whereas it is so punishable in Texas.<sup>5</sup> Whether the transaction is a gift, or akin to a loan, depends upon the intention.

A defendant who was arrested for the sale of liquor was fortunate enough to escape conviction by proving clearly that a payment made in money was a departure from the contemplation of the parties, and had been made simply because the other party to the bargain had found unexpectedly that his own stock of liquor had gone; so that the repayment in kind could not be made.<sup>6</sup>

The sale and the giving away of intoxicating liquor unlawfully are distinct and separate offences. Proof of the one will not sustain an indictment for the other.<sup>7</sup> One who kept beer in the rear wareroom of a shoe store, and who at times treated visitors, was held not to be guilty of sale in so doing,<sup>8</sup> although it is necessary to remember, in connection with such a case, the

<sup>1</sup> *State v. Hassett*, 64 Vt. 46 (1891).

<sup>2</sup> *Comm. v. Peters*, 2 Pa. Super. 1 (1895); *contra*, *Hunter v. State*, 60 Ark. 312 (1877). See *White v. State*, 93 Ga. 47 (1893).

<sup>3</sup> *Skinner v. State*, 97 Ga. 690 (1896). But delivery of whisky for the hire of a carriage was held to be a sale, in *Paschal v. State*, 84 Ga. 326 (1889).

<sup>4</sup> *Comm. v. Abrams*, 150 Mass. 393 (1890). And see *Gillan v. State*, 47 Ark. 555 (1886).

<sup>5</sup> *Keaton v. State*, 38 S.W. 522 (1897); *Lambert v. State*, Tex. Cr. App. 39 S. W. 299 (1897).

<sup>6</sup> *Coker v. State*, 8 So. (Ala.) 874 (1891).

<sup>7</sup> *Humpeler v. People*, 92 Ill. 400 (1879); *Stevenson v. State*, 65 Ind. 409 (1879); *State v. Briggs*, 47 N.W. Iowa, 865 (1891); *Harvey v. State*, 80 Ind. 142 (1881); *Kurz v. State*, 79 Ind. 488 (1880); *Wood v. Oregon Territory*, 1 Oregon, 223 (1856); *State v. Freeman*, 27 Vt. 523 (1858); *Wlecke v. People*, 14 Ill. App. 447 (1883); *New Decatur v. Laude* (Ala.), 9 So. 382 (1891); *Williams v. State* (Ala.), 8 So. 668 (1891). Delivery of liquor from a speak-easy, on promise of recipient to bring a hen, is a sale, and not a gift: *McGruder v. State*, 83 Ga. 616 (1889).

<sup>8</sup> *State v. Standish*, 37 Kan. 643 (1887).

interpretations mentioned earlier in this paper as complementary to this principle underlying this decision. Where, under pretence of gift of liquor, a party sells some other article for more than its value, and gives the liquor as part consideration, he can be prosecuted for the sale, but not for the gift of the liquor.<sup>1</sup> A count in an indictment for the sale of liquor to a minor will not be sustained by proof of gift.<sup>2</sup> "In framing indictments the safer plan is to have two or more counts, charging the different offences severally in separate counts. In this way the indictment will meet the different phases of the evidence."<sup>3</sup>

Ordinarily, the difficulty is not in the interpretation of the statute, but in ascertaining the motives of the parties. Delivery of property to another, upon request, for his use, *prima facie* imports a sale rather than a gift.<sup>4</sup> It is a question for the exclusive determination of the jury, in view of all the evidence, whether the transaction was intended by the parties to be a sale or merely a gift. If intended as a gift, the law implies no agreement to pay, and the transaction cannot be treated as a sale. On an information for selling without a license, an instruction that if the delivery of the liquor "was not then and there declared to be a gift, the law implies an agreement to pay the reasonable value thereof, and the transaction is a sale," was held to prevent proper review of all the circumstances.<sup>5</sup> So, in another case, it was held that evi-

<sup>1</sup> *Holley v. State*, 14 Tex. Cr. App. 505 (1883).

<sup>2</sup> *Siegel v. The People*, 106 Ill. 89 (1883); *Humpeler v. The People*, 92 Ill. 400 (1879); *Williams v. State*, 91 Ala. 14 (1890). And see *Gillan v. State*, 47 Ark. 556 (1886); *Young v. State*, 58 Ala. 359 (1894). An indictment charging sale was sustained by proof of gift, under a statute providing that a giving away should be deemed to be a selling: *Dahmer v. State*, 56 Miss. 787 (1879).

<sup>3</sup> *Williams v. State*, 91 Ala. 14 (1890). In an action for a penalty, a declaration alleged sale or gift. Demurrer on the ground that this left it uncertain whether a sale or gift was intended, the statute giving the penalty for either, was overruled: *Hamer v. Eldridge*, 50 N. E. (Mass.) 611 (1898). See, also, *State v. Hodgson*, 66 Vt. 134 (1893), where an indictment charging either offence was sustained under legislation prescribing just such a form of indictment.

<sup>4</sup> *Dant v. State*, 106 Ind. 79 (1885).

<sup>5</sup> *Keiser v. State*, 82 Ind. 379 (1882).

dence of drinks on Sunday in a saloon, without anything to show payment, fails to prove sale; and that no conviction could be had, as there was no prohibition of gift.<sup>1</sup> We can put it a little stronger still, and be correct. Without an understanding—albeit an implied one—that there shall be compensation, the delivery of liquor is a mere gratuity and not a sale.<sup>2</sup>

The word gifts must be given an enlarged sense when contained in a statutory prohibition of gifts to minors. A sale to a minor was held to be a gift within such a statute.<sup>3</sup> The treating of minors has led to a little conflict and to quite a number of questions. The better class of cases would seem to be those which hold that where a saloonkeeper, at the direction of one who pays therefor, delivers a glass of intoxicating liquor to a person under the age of twenty-one, both he and the adult paying for the liquor are guilty of a misdemeanor. All persons who participate in an act or transaction which is a misdemeanor are alike guilty.<sup>4</sup> In a case in Alabama it was held that a conviction might be had for selling

<sup>1</sup> *Keller v. State*, 23 Tex. App. 259 (1887).

<sup>2</sup> *Commonwealth v. Packard*, 5 Gray (Mass.), 101 (1855). In this case a witness swore that he called for liquor at a public house kept by defendant, and that a waiter, by defendant's order, delivered the liquor to him; that witness had never paid defendant, nor the waiter; that he offered to pay, but that defendant declined to take anything. It was held that this was no evidence of a sale.

<sup>3</sup> *Commonwealth v. Davis*, 12 Bush (Ky.), 240 (1876).

<sup>4</sup> *Topper v. State*, 118 Ind. 110 (1888); *Commonwealth v. Davis*, 12 Bush (Ky.), 240 (1876); *State v. Munson*, 25 Ohio St. 381 (1874). In the Indiana case, which has been cited in the text, there was an actual delivery of the liquor to the minor by the vendor, at the request, however, of the adult vendee. The decision was in 1888. Seven years before that time a decision had been rendered, which we must consider as overruled, although some tweedledum-dee distinctions may be asserted. In the case in 1881 the indictment charged a gift to the minor. The evidence proved that the adult friend called for two glasses, and the glasses were delivered to him, and that he delivered one to the minor by way of treat. The decision was that the seller had not given to the minor, and was not guilty. The opinion in 1888 omitted any reference to the case in 1881: *Kurz v. State*, 79 Ind. 488 (1881). It may be remarked that *Kurz v. State* has not been treated with favor in later decision of the Indiana Court. See *Myers v. The State*, 93 Ind. 253 (1883).



## 24 GIFTS AND SALES OF INTOXICATING LIQUOR CONTRASTED.

or giving liquor to a minor on proof that the minor and his uncle came into the defendant's saloon, and that the uncle called for two drinks; that the defendant set out a bottle of whisky, with two glasses; that two drinks were poured out, for which the uncle paid, giving one to the minor, who thereupon drank it in defendant's presence.<sup>1</sup>

In Massachusetts and in Illinois the tone of the opinions has been opposed to the foregoing, although the points involved did not require decision. In a Massachusetts case the court held that a sale to an adult, who thereupon treated a minor, was not a "sale or gift" by the seller to the minor. Very clearly it was not a "sale" to the minor; but there was a "gift" by the purchaser to the minor, in which the bar-keeper participated, by handing to the minor such drink as the latter indicated.

The court even took such a narrow view of the law as to intimate somewhat that the delivery to the minor could not be considered as "delivery" under another section of the statute, not then before the court. It is difficult to approve of the decision in this case.<sup>2</sup> The court might well have understood the word "give," in the statute, as used in the sense of "convey" or "deliver," or it might have said that all participants in an act of misdemeanor are guilty.

The Illinois decision,<sup>3</sup> however, is not open to effectual attack. It has, indeed, been questioned,<sup>4</sup> but it is only to the side remarks of the court that objection can be attempted. The decision itself was, that a bartender did not violate a statutory prohibition of sale to a minor by a sale to an adult,

<sup>1</sup> *Page v. State*, 84 Ala. 446 (1887). See analogous case in *Walton v. State*, 62 Ala. 197 (1878).

<sup>2</sup> *St. Goddard v. Burnham*, 124 Mass. 578 (1878), decided under Massachusetts statute of 1875, c. 99, § 15. See, to same effect, *Bartman v. State of Texas*, 43 S. W. 984 (1898).

<sup>3</sup> *Siegle v. People*, 106 Ill. 89 (1883).

<sup>4</sup> In *People v. Neuman*, 85 Mich. 98, 48 N. W. 290 (1891), dissatisfaction was expressed with the *Siegle* case; but whether that was to be regarded as right or wrong, the court was of opinion that where a statute forbids not simply the selling or giving to a minor—but further, the "furnishing" of the same—then a saloonkeeper who allows the adult to treat the minor on his premises is guilty.

who treated the minor. This agrees with decision in Arkansas,<sup>1</sup> and is correct, no question of "giving" or "furnishing" arising in the case. Evidence that drinks were taken by a number of persons together, including the minor, without evidence showing who paid, is insufficient to prove a sale to the minor.<sup>2</sup> Where the statute prohibited sale or furnishing—a general invitation to those present to help themselves from a jug of whisky in a public store, accepted, among others, by a youth of sixteen, was held to constitute an offence against the statute.<sup>3</sup>

The saloonkeeper, otherwise guilty, is not relieved by an authorization of the father to give the liquor,<sup>4</sup> in the absence of legislation permitting such authorization. A prohibition of sale or gift applies as well to one who buys the liquor and treats the minor as it does to the vendor.<sup>5</sup>

A minor whose disabilities have been removed by decree in chancery is still a minor within legislation prohibiting sales of intoxicating liquor to minors.<sup>6</sup>

*Luther E. Hewitt.*

Philadelphia, December, 1898.

<sup>1</sup> Ward v. State, 45 Ark. 351 (1885).

<sup>2</sup> Birr v. People, 113 Ill. 645 (1885).

<sup>3</sup> Blodgett v. State, 23 S. E. (Ga.) 830 (1895). Those of the company who pass the liquor around would not be held guilty: Miller v. State, 55 Ark. 188 (1892).

<sup>4</sup> State v. Lawrence, 97 N. Car. 492 (1887); State v. Best, 12 S. E. (N. Car.) 907 (1891).

<sup>5</sup> Parkinson v. State, 14 Md. 184 (1859); same case, 74 Am. Dec. 522. The Ohio statute read: "It shall be unlawful for any person to buy for or furnish to any minor, to be drank by such minor, any intoxicating liquors," etc. Under this it was decided, in State v. Munson, 25 Ohio St. 381 (1884), that a saloonkeeper who supplied liquor to a minor, to be drank by him, was punishable, although it may have been purchased and paid for by another.

<sup>6</sup> Coker v. State, 8 So. Ala. 874 (1891).

## PROGRESS OF THE LAW.

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AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE  
REPORTS.

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### ADMIRALTY.

Where the master of a vessel recommended a materialman to the engineer as a proper person to do any work needed by the vessel, and the engineer employed him in making some repairs, the master being on board at the time and knowing that the work was going on, it was held that the materialman was justified in believing that the engineer was authorized to employ him upon the credit of the steamer. This case falls within the principle of *The Alfred Dunois*, 76 Fed. 586, and is distinguishable from that of *The H. C. Grady*, 87 Fed. 232, there being here something more than acquiescence upon the part of the master: *The Tiger*, 89 Fed. 384.

The opinion of Lowell, J., in the recent case of *The Iris*, 88 Fed. 902, will be read with interest by all admiralty lawyers, as being the last word on the vexed subject of maritime liens for supplies and repairs to a vessel in her home port. It contains an excellent statement of the principles to be derived from such cases as *Thomas v. Osborn*, 19 Howard, 22, *The Kalorama*, 10 Wall. 204, and *The Lottawanna*, 21 Wall. 558. In the present case the vessel had been delivered to a vendee upon part payment of the purchase money, under an agreement whereby it was provided that she could be retaken by the owner upon failure to pay the balance, the title not to pass until said balance was paid. The apparent owner put a master in charge of the vessel, and repairs were ordered by him. The vendee becoming hopelessly insolvent, the owner retook the vessel and denied that she was liable. Judge Lowell held that there was nothing in the case to put the libellants on inquiry and that they were justified in relying upon the holding out of the vendee as the owner.

In answer to the contention of the claimant that in the vessel's home port the presumption is against the lien, the court said: "If the presumption be taken to mean that the authority of the master of a domestic vessel to contract for her

**ADMIRALTY (Continued).**

repair cannot always be presumed, the statement is reasonable. The owner of a domestic vessel in some cases must be sought out, and the authority of the master to bind him will not be presumed as readily as in the case of a foreign vessel whose owner is absent; but where the master had authority to order the repairs, or where they were ordered directly by the owner, it seems that credit is to be deemed to have been given to the vessel, or to the owner personally, or to both, according to the laws and usages of the domestic port, and the circumstances of the particular case."

Judge Brown, of the Southern District of New York, has displayed his customary good sense in throwing the risks of loading a vessel for her first voyage upon her owners and not upon the charterers or shippers. **Proper Ballast, Owner's Risk** The amount of ballast needed by a new vessel, taken in connection with the cargo, is always in some measure a matter of experiment; and it is eminently just and proper that the risk of any uncertainty in this respect should fall on the owner; this is especially so where the ship is guaranteed to be "tight, staunch and strong, and in every way fitted for the voyage." As the jettison of part of the cargo was made necessary by the unseaworthy condition of the ship, it was held that the Harter Act did not exempt the owners from liability: *The Whittieburn*, 89 Fed. 526.

It is well settled that seamen who have signed articles for a voyage, cannot be compelled to fulfill their contract if they refuse to go to sea because they believe the vessel unseaworthy, unless upon a survey she be found staunch and properly equipped. **Rights of Passengers** In the case of *The Guardian*, 89 Fed. 998, it is held that passengers are entitled to as much protection as the crew, and have the right to act in the light of appearances. Consequently, where a vessel appeared unseaworthy and was so reported in the public press, and the experts who surveyed her said they could not "recommend her for a passenger vessel in her present condition," the passengers were allowed to recover the price of their tickets, although the vessel subsequently performed the voyage in safety and clearly showed that she had been entirely seaworthy.

**ASSIGNMENTS FOR CREDITORS.**

It was held in *Bellows v. Bellows*, 53 N. Y. Suppl. 853, that,

## ASSIGNMENTS FOR CREDITORS (Continued).

while a person may by proper assignment convey the right to  
**Right to Use** use his name in any business, yet such right does  
**Name** not pass under the ordinary phraseology of a general assignment for the benefit of creditors.

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## ATTORNEYS.

The Supreme Court of New York has added another to the many cases dealing with contingent fees. In *Taylor v. Long Island R. Co.*, 53 N. Y. Suppl. 830, the plaintiff  
**Costs,** in an action for negligence agreed to pay her  
**Right of** attorney seventy per cent. of the amount recovered,  
**Lien** but nothing if he failed to collect damages. A large sum was recovered, of which the attorney paid over seventy per cent. to his client and retained the remaining thirty per cent. and all the costs recovered. A motion was made to compel him to pay over these costs. The court held that the costs were a part of the "amount recovered" and did not belong to the attorney, but that he had a right to thirty per cent. of them under his agreement. The language of *Re Bailey*, 31 Hun, 608, and *Delaney v. Miller*, 84 Hun, 244, was disapproved as tending to the theory that the costs belonged absolutely to the attorney. He has, in fact, only a lien on them: *Starin v. Mayor*, 106 N. Y. 87.

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## BANKRUPTCY.

Though the Bankruptcy Law of July 1, 1898, prohibits the filing of petitions until one or four months after its date, yet  
**Bankruptcy** as it provides that it shall go into full force and  
**Law, Date** effect upon its passage, proceedings under conflicting state insolvent laws should not be begun after that date: *Parmenter Co. v. Hamilton*, 51 N. E. (Mass.) 529.

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## BANKS AND BANKING.

*State Saving Bank of Detroit v. Foster*, 76 N. W. (Minn.) 499, is of some importance as defining who are depositors in  
**Who are** the eye of the law. Admitting that one bank  
**Depositors** may be a depositor of another, it was, nevertheless, held that the certificate of deposit issued in consideration of the right to draw on the payee bank for a like amount did not constitute the payee bank a depositor under the statute.

### CARRIERS.

A railway, running along the streets within one city and over a highway to a neighboring city under a law allowing any "street-railway companies" extending their lines beyond the limits of their town, to build on any highway of a width of 100 feet or more, was operated at first by steam engines, but afterwards by overhead trolley. Its main business was that of transporting passengers, but some express and freight cars were run. On appeal from tax settlement, held to be a "street railway," and not a "railway corporation" within Code 1873, § 1317, providing for assessment of such corporations by the State Executive Council; *Cedar Rapids & M. C. Ry. Co. v. City of Cedar Rapids* (Sup. Ct. of Iowa), 76 N. W. 728.

### CONFLICT OF LAWS.

The undoubted rule that the *lex domicilii* governs the construction of a will, was applied by the Court of Chancery of New Jersey to a bequest to a trustee in New Jersey, for a married woman's sole and separate use. The trust by the law of Pennsylvania, the testator's domicil, would be active, but by New Jersey law would be passive only. The fact that the trust had its situs in New Jersey and was to be carried out by a citizen of that state, was held immaterial. The Pennsylvania law governed: *Rosenbaum v. Garrett*, 41 Atl. 253. *Cross v. U. S. T. Co.*, 13 N. Y. 330 (1856), is in accord. See, also, *Spindle v. Shreve*, 111 U. S. 542, 547 (1883); *Ruebsam's Est.*, 26 W. N. C. (Pa.) 311 (1890); *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558 (1892). In the latter case a bequest in trust, valid by the law of the state of administration and of the domicil of the trustees, was enforced in New York, the domicil of the testator, although by the law of the latter state it would be void as a perpetuity. Interstate trusts seem to be secure if upheld by either law. In *Fowler's Appeal*, 125 Pa. 388 (1889), s. c., 17 Atl. 431, 23 W. N. C. 500, the laws of three states were considered. The law of the domicil of the settlor and of that of the *cestui que trust* favored the trust, which was invalid by the law of the trustee's domicil. The court upheld the validity of the trust.

### CONSTITUTIONAL LAW.

The Supreme Court of California has decided that the

## CONSTITUTIONAL LAW (Continued).

constitutional provision (Art. 4, § 25, sub-d. 16, California Constitution) forbidding local or special laws, or laws releasing or extinguishing in whole or in part the liability of any corporation or person to the state, is not infringed by the retrospective exemption from the inheritance tax of certain classes of corporations and relatives (St. 1897, p. 77, amending Act of March 23, 1893). The court refers to the Maryland case of *Montague v. State*, 54 Md. 481 (1880), which pronounced valid an amendment to the collateral inheritance law of that state, putting the "husband" among the exempted classes.

**Exemptions from Collateral Inheritance Tax, "Special Laws"** The amended statute in California included, among those exempt, the "niece or nephew when a resident of this state." This distinction between resident and non-resident relatives was held unconstitutional under Const. U. S., Art. 4, § 2. The court, thereupon, rejected the invalid limitation, and, construing the statute as if such part had not been enacted, exempted all nieces and nephews: *In re Stamford's Estate*, 54 Pac. 259.

The Maryland Institute for the Promotion of Mechanic Arts, a corporation of Maryland receiving an annual appropriation from the state, in 1893 entered into a contract with the city of Baltimore for the instruction of a certain number of pupils to be appointed by the city councilmen. One councilman appointed a colored youth to the scholarship. The appointee was denied admittance on account of his color, and filed a petition for a mandamus requiring the school officers to admit him. Decree dismissing petition was affirmed by the Supreme Court of Maryland. The court said, ". . . suppose . . . that there was a school of great merit, conducted exclusively for the instruction of colored pupils in branches of learning not taught in the public schools, and that the legislature saw fit to appropriate money for the tuition of a number of colored pupils. It is not probable that such action would be assailed as forbidden by the Fourteenth Amendment because of an unjust discrimination against the whites:" *State v. Maryland Institute*, 41 Atl. 127.

The Illinois Act (Laws 1879, p. 113) which provides that receiving deposits by an insolvent bank shall be punished as



## CONSTITUTIONAL LAW (Continued).

**Insolvent Banks, Embezzlement, Fourteenth Amendment**      embezzlement, does not deprive one convicted of such offence of any liberty or property right guaranteed by the Fourteenth Amendment. The privilege which the banker had of taking deposits in insolvency before the passage of the Act was not a "matter of personal prerogative or property right:" *Dreyer v. Pease*, 88 Fed. 998. The Oklahoma Act (Statutes 1893, c. 7, sec. 1), of similar effect, was sustained in *Winfield v. Ott*, 54 Pac. 714.

In *Pingree v. Mich. Cent. R.*, 76 N. W. 635, the Supreme Court of Michigan has applied the doctrine of the Dartmouth College case to a railroad, the charter of which gave it the right of fixing its own rates under a maximum of three cents a mile. This charter was held to tie the hands of the legislature, although the railroad originally was but an unimportant local concern, and since that time, under legislative permission to extend its lines, has grown into a gigantic state and interstate system.

## CONTRACTS.

When a lender is a resident of one state and the borrower is a resident of another, and the evidence of debt, and the deeds given to secure same, as well as all other papers connected with the transaction, are executed in the state of the borrower's residence, and there is nothing in the papers to indicate that it was the intention of the parties that the contract should be controlled by the law of the state of the lender's residence, the contract, as to its validity, form and effect, will be controlled by the law of the state in which the contract was executed: *Hollis v. Covenant Building and Loan Ass'n* (Supreme Court of Georgia), 31 S. E. 215.

The Supreme Court of Georgia, in *Hoyle v. Southern Saw Works*, 31 S. E. 137, has reiterated the rule that while inadequacy of price alone will not be sufficient ground on which to set aside a contract, yet that circumstance, taken in connection with others of a suspicious nature, may afford such a presumption of fraud as would authorize the court to make such a decree.



## CONTRACTS (Continued).

The payment of money for lobbying being against public policy, the court will not compel contribution between partners

**Lobbying,** on account thereof, nor will it, when one partner  
**Contribution** is chargeable with the receipts, allow him credit for money so expended: *McDonald v. Buckstaff et al.* (Supreme Court of Nebraska), 76 N. W. 476.

In *Heilbroun et al. v. Herzog*, 53 N. Y. Suppl. 841, (Supreme Court, App. Div. of New York), the plaintiff, relying on the

**Rescission,** defendant's statement to a mercantile agency that  
**Waiver** he owned certain property, sold him goods on credit, taking notes for the purchase money. Subsequently learning that the statements were incorrect, the plaintiff called on defendant, and being informed that the statement was a mistake, expressed himself as satisfied, and did not demand the goods or the price, nor did he offer to return the notes. Five months later, and before the notes were due, the plaintiff brought an action to recover the price of the goods. Held, that plaintiff had waived his right to rescind either the entire contract or that portion of it relating to the time of payment.

The perennial question involving the statute of frauds comes this month from Wisconsin, the Supreme Court of that state

**Statute of** deciding that an oral agreement to purchase grow-  
**Frauds,** ing timber and manufacture it, is within the statute  
**Contract for** and unenforceable; and that a written collateral  
**Purchase of** agreement between two of the partners, reciting  
**Growing** that a certain portion of the profits of such pur-  
**Timber** chase should be shared by one of them "and his associates" is not a sufficient memorandum of a partnership with one who was not a party thereto, but was alleged to be one of the "associates:" *Seymour et al. v. Cushway*, 76 N. W. 769.

By a statute of New York (Laws 1892, c. 602, § 6; Laws 1893, c. 66) it is provided that no one shall do business as a

**Unregistered** plumber till he has passed an examination and  
**Plumbers,** obtained a certificate of competency and has had  
**Suit for Work** himself registered; a failure to comply being made  
**and Materials** a misdemeanor. In *Johnston v. Dahlgren*, 52 N. Y.

Suppl. 555, the question was raised whether a plumber, who had not obtained his certificate and registered, could maintain suit for work done and materials supplied. The majority held that it did not need "the citation of authorities to establish the proposition that, as the contract to do plumbing under these

**CONTRACTS (Continued).**

circumstances is unlawful, the courts will not give any aid in enforcing it, and will not permit a person to recover anything because he has performed it: Broom, Leg. Max. 576." Ingraham, J., delivered a very vigorous dissent, he being of the opinion that "where a statute declares an act which was before legal to be illegal, and provides a penalty for a violation of the statute, that penalty is exclusive."

**CORPORATIONS.**

Pullman's Palace Car Company seems to figure in litigation in which the results reached cannot but be regretted by all who are interested in sound legal development.

**Limits of  
Charter  
Power,  
Holding of  
Real Estate**

Having had the benefit of judicial aberration in the long litigation with the Central Transportation Company, a certain rough justice was done when the corporation was made to suffer lately by the decision of a bare majority of the Supreme Court of Illinois in *People, ex rel. v. Pullman's Palace Car Co.*, 51 N. E. 664. The proceeding was an information in the nature of *quo warranto* to forfeit the charter of the respondent for abuse of its chartered authority "to purchase, acquire and hold such real estate as may be necessary for the successful prosecution of its business." The alleged abuse consisted in maintaining for many years without objection from the state a business block in the city of Chicago, in which it rented rooms not needed for the use of the corporation; in likewise maintaining a boiler plant, from which the corporation sold the surplus steam; in likewise maintaining a town with highways, sewerage, water and light systems and schools, churches and business houses—all erected and maintained, not for profit, but merely for the purpose of creating a community of skilled workers and artisans who, under such conditions, could best perform, it was thought, the grade of work essential to the successful prosecution of the business of the corporation. A majority of the court undertook to distinguish the many cases in which similar exercises of power (though on a smaller scale) have been countenanced by courts—on the ground that in those cases the acts done were "necessary," whereas in the present case they were expedient merely. An exception was made in the case of the business block and the power plant, on the theory that the surplus capacity in each case might at some time be required by the corporation itself. The dissenting opinion of three of the justices is a satisfactory refutation of

## CORPORATIONS (Continued).

the position of the majority. It is, perhaps, to be regretted that the true function of a corporate charter was not more carefully considered. The function of a charter is not to confer power but to define the scope of the corporate business. The real question in this case was whether the respondent was engaging, *as a business*, in an enterprise beyond the scope of its charter. Clearly it was not. The activities which were complained of were engaged in, not as an end in themselves, with a view to profit, but as a means to an end—the end being the successful prosecution of the very business which the charter defines.

It will be remembered that the Supreme Court of Alabama, in *Elyton Land Company v. Birmingham Warehouse & Elevator*

<p><b>Stock Paid for In Property, Fraudulent Over- Valuation</b></p>	<p><i>Co.</i>, 92 Ala. 425, made a careful investigation and statement of the law in regard to fraudulent over-valuation of property exchanged for the stock of a corporation. The same court was called upon to deal with this question again in <i>Lea v. Iron Belt Mercantile Company</i>, 24 So. 28. A demurrer to a creditor's bill was filed on the ground (<i>inter alia</i>) that the bill charged no fraud against the defendant. The demurrer admitted, however, an averment that the appellant and his associates had conveyed to the corporation real estate (for which they had just paid \$90,000) as full payment for stock of the par value of \$1,250,000. After citing the earlier decision, the court observed: "No other charge of fraud was necessary than such as is inferable from the above averment."</p>
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A late case on the subject of *ultra vires* contracts of corporations has arisen in New York, a jurisdiction which, on

<p><b>Ultra Vires Contracts, Guaranteed Stock</b></p>	<p>that question, has always held views peculiar to itself. A loan association, which was authorized to do business only on the "mutual" plan, issued stock guaranteed to pay a certain dividend, and as securities therefor deposited certain mortgages as a sort of collateral. Having gone into the hands of a receiver, the latter brought suit in equity to recover the securities. The court, in pronouncing judgment, after emphasizing the fact that, while the contract was <i>ultra vires</i>, it was neither <i>malum in se</i> nor <i>malum prohibitum</i>, continued: "The receiver, without restoring, or offering to restore, to these defendants the money obtained from them through this device, now asks a court of equity to take from the defendants these mortgages which</p>
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CORPORATIONS (Continued).

represent their monies. When did a court of equity, knowingly, give active assistance to a suitor confessedly pursuing innocent parties for the purpose of robbery? The court has sometimes refused to aid the innocent in the enforcement of tainted contracts, or contracts void from public policy; but it has uniformly refused to assist the wrongdoer, as in the *Utica Insurance Cases*:" *Dickinson v. Continental Trust Co.*, 52 N. Y. Suppl. 672.

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CRIMINAL LAW.

The Supreme Court of New York, in *People v. Winant*, 53 N. Y. Suppl. 695, decided that a bribe taker is an accomplice of the bribe giver, and hence his testimony must be corroborated.

The rule that a public prosecution is under the control of the public, and not the injured individual was exemplified in *State v. Newcomer*, 54 Pac. 685. In this case the defendant was arrested on a charge of rape, but the parties agreed that a marriage should take place, and the prosecution should be discontinued. The marriage took place, and they lived together as man and wife, the prosecution having been dismissed and the costs taxed to the defendant. Subsequently the defendant refused to live with his wife on hearing of rumors that she was having improper relations with other men. Her father then filed the complaint in this case for rape. The above facts were set up as a defence. Held, no defence.

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DAMAGES.

In *Braun v. Craven*, 51 N. E. (Ill.) 657, the court refused, in accordance with precedent, to allow damages for mental suffering alone, unconnected with any physical injury. It appeared that the defendant had used threats and sharp words to plaintiff which caused her a nervous shock which resulted in St. Vitus' dance. It was held that the damage was not the natural and probable consequence of plaintiff's act. See, *accord*, *Scheffer v. R. R. Co.*, 105 U. S. 249; *Ewing v. Ry. Co.*, 147 Pa. 40; *Railway Comr's v. Coultas*, 13 App. Cas. 222; *Mitchell v. Ry. Co.*, 151 N. Y. 107.

## ELECTIONS.

The Supreme Court of Minnesota, construing a statute (Gen. St. 1894, § 30) providing that the method of determining the largest number of votes polled at the last preceding general election by a political party shall be by taking the average vote received by such of its candidates as were not endorsed by any other party, holds that it does not apply to a case where each of two independent parties separately nominate all of the candidates of the other: *Higgins et al. v. Berg*, 76 N. W. 788.

## EVIDENCE.

In *Collum v. People*, 54 Pac. (Cal.) 589, it was held that a confession of one conspirator is not admissible against another if made after the alleged crime is complete and the object of the conspiracy accomplished, nor can such evidence, itself inadmissible, be admitted to impeach the credit of the witness, unless it clearly and directly contradicts some prior portion of his testimony. An accessory after the fact is not an accomplice, and a conviction on his uncorroborative testimony will stand.

*Stephens v. Comm.*, 47 S. W. (Ky.) 229, is an instance of the rule that dying declarations are admissible if the declarant himself anticipates death as imminent. There the declarations were admitted, although the physician attending him was encouraging him by holding out hopes of his recovery, the declarant himself expressing his expectation of death, and his condition being very precarious, his lung perforated, and blood spurting forth at every cough or gasp.

Two cases in the New York Supplement serve to define the boundaries of the rule which admits evidence of trade customs and usages to vary the apparent meaning of written contracts: In a county court of Cataraugus case, *Bonnold v. Glasser*, 53 N. Y. Suppl. 1021, evidence was admitted that a "thousand" bricks were to be computed not by number but by cubic space, it being shown that such was the universal usage among bricklayers on the principle that trade contracts are made with reference to all usages of such trades, and are to be interpreted in the light thereof; but in the Supreme Court (Appellate Division), in the case of *Herberger v. Johnson*, 53 N. Y. Suppl. 1057, an

**EVIDENCE (Continued).**

action to recover commissions for "placing" a loan excluded evidence that "placing" a loan included the payment of all expenses, for the reason that use of the word "place" was too familiar and well settled to allow of expert testimony to interpret its meaning.

In *Kokes v. State*, 76 N. W. (Neb.) 467, the court took judicial notice of the United States Census, the school census taken by authority of a statute of the state and by the officers empowered for the purpose, and of the state and county elections and the result of each and all of them.

It is a well settled rule that a witness may refresh his memory by referring to a memorandum made at or near the time of the transaction in question. This is sometimes called a rule of necessity and is even extended where circumstances call for it. Where an employer always looked over and verified certain memoranda or entries made by his book-keeper, he was allowed to testify as to the facts contained in such entries, though he had no independent recollection of them even after referring to the paper. The ground adopted by the court was that the witness at the time the entries were made knew they were correct: *Clark v. Bank*, 52 N. Y. Suppl. 1064.

This seems to be the practice in some other jurisdictions, both as to the admission of entries made by a person other than the witness and as to the lack of necessity of independent recollection: *Borrough v. Martin*, 2 Camp. 112; *Anderson v. Whalley*, 3 C. & Kir. 54; *R. v. St. Martin's*, 2 A. & E. 210; *Russell v. Coffin*, 8 Pick. 143; *Pigott v. Halloway*, 1 Binn. 436.

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**FRAUDULENT CONVEYANCES.**

*Guichtel v. Jewell*, 41 Atl. (N. J.) 227, contains an equitable solution of a frequently recurring difficulty. An insolvent debtor had made a fraudulent assignment of property to which he became heir, to a creditor, whose claim, however, was considerably less than the property assigned; as it was not proved, however, that the assignee was aware of assignor's fraudulent intent, the court allowed the assignee to keep such sum as would repay her, turning over the balance to assignor's receiver.

## GUARANTY.

*Hawey v. First National Bank*, 76 N. W. (Neb.) 879, is a sample of a very common class of business transactions.

**Payment,**  
**Extension of**  
**Time**      Hawey, wishing to assist his son, signed a guaranty to the bank for \$7000 of any loan or discount to the son within one year. Several loans were made and were renewed by the son's notes from time to time beyond the year. It was held that the notes were not taken in payment of, but simply to represent, the original loan, and hence the father was liable. The extensions of time were excused on the ground of a well proved usage.

## HUSBAND AND WIFE.

*Hager v. National German-American Bank*, 31 S. E. (Ga.) 141, has the interest which almost always attaches to a case involving a conflict of laws. A married woman living in Tennessee, where the common law restrictions as to her power to contract, still exist, executed in that state a promissory note, which, however, was dated in Minnesota, where a married woman may make such an instrument. It was held by the Supreme Court of Georgia that the law of the place of performance cannot be invoked to aid a person who is seeking to enforce a contract which is absolutely void at the place where it was executed.

In *Kunze v. Kunze*, 53 N. Y. Suppl. 938, it was decided that a reasonable allowance of alimony will not be modified, because the husband has lost employment through his wife's acts; at best, such facts may be used as a defence in proceedings for contempt for non-payment.

No alimony can be allowed where a decree is entered declaring a marriage void *ab initio*; it is based upon the husband's duty to support his wife and cannot be claimed by one who, in the eye of the law, never was his wife: *Park v. Park*, 53 N. Y. Suppl. 677.

## INSURANCE.

Action was brought on a life insurance policy taken out by G. B., who was killed while riding on a locomotive. He had been riding on the passenger car, but left it, at the invitation of the railroad superintendent, to ride on the locomotive, where he was killed in a wreck. The insurance policy provided, *inter alia*, that the company should not be liable if death ensued



INSURANCE (Continued).

while the insured was "in or on any such conveyance [using steam power] not provided for transportation of passengers." Held, that the company was liable, since the whole train, including the engine, constituted a "conveyance." Held, also, that the insured, when killed, had not ceased to be a "passenger" under another clause in the policy which allowed a double recovery for death "while riding as a passenger in any passenger conveyance using steam as a motive power:" *Berliner v. Travelers' Ins. Co.*, 53 Pac. (Cal.) 918.

The Federal courts hold that where an accident policy excepts "intentional injuries inflicted by the insured or any other person," the company is, nevertheless, liable for "death caused by the voluntary act of the assured, when his reasoning faculties were so far impaired that he was not able to understand the moral character, or the general nature, consequences, and effect, of the act he was about to commit." Where the death is caused, not by the assured, but by a third person in the state of mind just described, it would seem but logical to hold the insurance company liable, and such a result was reached in *Berger v. Ins. Co.*, 88 Fed. 241.

Accident  
Policy,  
Homicide by  
Lunatic

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JUDGMENTS.

In accordance with principle and authority, the Circuit Court of the Southern District of California has held, *Savings and Trust Co. v. Bear Valley Co.*, 89 Fed. 32, that the period for which a judgment lien exists by statute cannot be extended by consent or agreement of the parties thereto.

Lien,  
Consent to  
Extend

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LANDLORD AND TENANT.

In *Humiston, Keeling & Co. v. Wheeler*, 51 N. E. 893, a five story building was rented to defendant, with the exception of a few rooms on the second and fourth floors. Before the expiration of the lease, a fire occurred in the building, whereby the interior was burned out down to the first floor, but the walls remained intact. The first floor was so covered with debris as to be untenable.

Lease,  
Destruction of  
Portion of  
Building,  
Abatement of  
Rent



## LANDLORD AND TENANT (Continued).

In an action on the lease for rent, the Supreme Court of Illinois held that there was not such a "total" destruction of the building as would extinguish the lease, since (1) the supplying of a new roof and floors would have been "repairs" and not the "creation of a new building," and (2) the lease included both the building and the land, so that even if the building had been totally destroyed, there would have been a subject matter, the land, upon which the lease could have operated. The theory of the survival of a lease, after the destruction of the demised premises, is discussed by Mr. Joseph H. Taulane in an interesting article in 29 Am. Law Rev. 351.

A novel case of misdescription in a lease came before the Chancery Division in *Cowen v. Truefitt* [1898], 2 Ch. 551.

Lease,  
Misdescription

The lease was of the second floors of 13 and 14 Old Bond street, and granted a right of ingress and egress by the staircase in No. 13. It appeared that there was no staircase in No. 13, it having been torn out before the lease was made; but there was a staircase suited for the lessee's use in No. 14, which lessor refused to allow lessee to use, wherefore this action.

The defendant contended that a wrong description could be cut out of the instrument, but that something else—in this case the word "14"—could not be substituted for it. The court held, however, that the intention of the parties was to grant a right of way over the "staircase" which led up to the demised premises, and that the said staircase had merely been misdescribed; and this fact was apparent from the lease, and decided in favor of the plaintiff. While there is no decision exactly in point, it is held that where a deed may operate in one of two ways—one consistent with the evident intention of the parties and the other opposed thereto—it shall be construed to effectuate the intent: *Solly v. Forbes*, 4 Moo. 448; *Hotham v. E. India Co.*, 1 L. R. 638. In case of uncertainty in applying the description to the premises demised, the intention of the parties as to the extent of the demise is usually a question for the jury: *Liley v. Mayers*, 25 Pa. 398; *Putnam v. Bond*, 100 Mass. 58; but where the language of a lease is not ambiguous, evidence as to the intention of the parties is not admissible: *Davis v. Renisford*, 17 Mass. 207; *Brainard v. Arnold*, 27 Conn. 617; *Clark v. Bayard*, 9 N. Y. 183.

## LIBEL AND SLANDER.

The Appellate Court of Indiana, in *Samples v. Carnahan*, 51 N. E. 425, held that where one business acquaintance voluntarily writes to another advising him if a certain note of the acquaintance for \$50 was in the hands of a certain "jack-leg lawyer," to call it in, as he was in danger of losing it entirely, and that his money was safer where it was than in the hands of such a lawyer, he cannot excuse himself when sued for libel on the ground that it was a privileged communication.

**Privileged  
Communica-  
tion  
Reflecting on  
a Lawyer**

## MALICIOUS PROSECUTION.

The Supreme Court of Minnesota, in *Cole v. Andrews*, 76 N. W. 962, was of the opinion that a citizen going to the county attorney and communicating certain facts to him for the purpose of having a prosecution for a public offence instituted, does not give rise to the relation of attorney and client, and the communication is not privileged, and cannot be treated as such if he is afterwards sued for malicious prosecution.

**Privileged  
Communica-  
tions,  
Attorney and  
Client**

## MASTER AND SERVANT.

Two familiar principles are illustrated in *O'Neill v. Traynor*, 53 N. Y. Suppl. 918, to wit: (1.) That when a servant has been wrongfully discharged before the end of her term, the burden is on the master to show that she neglected to seek for, or refused to accept similar employment. (2.) That though the servant sue before the expiration of the term, she may, if the trial does not take place until after such expiration, recover damages for the entire term.

**Discharge,  
Damages**

## MORTGAGES.

*Phillips v. Yoeman*, 41 Atl. (N. J.) 104, is a curious illustration of the ambiguities that may occur in even a carefully drawn legal instrument. A two years' mortgage, with the usual option to the mortgagee to declare the principle due upon non-payment of interest, contained the unusual provision that the mortgagor should "have the right to redeem any or all of the mortgaged property" at any time prior to the two years hereinbefore mentioned upon payment of specified sums. Upon bill to foreclose within the two years,

**Foreclosure,  
Redemption**

**MORTGAGES (Continued).**

it was argued for plaintiff that this clause was intended to be inoperative, in case the time for payment of the entire debt had arrived, whether by limitation or by default; while defendant's counsel conceded plaintiff's right to foreclosure, but insisted upon a right of redemption being expressed in the decree. The court, however, took an intermediate view, viz.: that under New Jersey practice there could be no redemption after foreclosure, wherefore it necessarily followed that plaintiff's right to foreclose was suspended until the expiration of the two years.

*Biggs v. Hoddinott* [1898], 2 Ch. 307, is an important case. A mortgage of a hotel to a brewer contained a provision that the mortgagors would purchase their beer and liquors solely from the mortgagee. Upon motion to enjoin their purchase elsewhere, it was argued for defendants, upon the authority of *Jennings v. Ward*, 2 Vern. 520, that the mortgagee can obtain no advantage by the mortgage except the payment of principal, interest and costs. It was held, however, both in the lower court and upon appeal that the provision was valid because it did not, on the one hand, clog the equity of redemption, nor on the other was it unreasonable in itself, as there was a corresponding covenant on the part of the mortgagee to sell the beer and liquors to the mortgagor.

**MUNICIPAL CORPORATIONS.**

In an action to enjoin the delivery of certain corporate stock of the city of New York, by the comptroller, to any person other than the plaintiff, it appeared that the stock having been advertised as required by statute, said statute providing that the award should be made to the highest bidder, the plaintiff bid for same. "Our bid subject to the approval of the legality of the issues by our counsel." Defendant submitted on the same day a lower bid, unqualified in its terms, and the issue was awarded to him. Held, that plaintiff's bid was conditional, and therefore illegal: *Trowbridge et al. v. City of New York et al.* (Supreme Court of New York), 53 N. Y. Suppl. 616.

The Supreme Court of Georgia, in *Wyatt v. City of Rome*, 31 S. E. 188, decided that a municipal corporation while enforcing a valid ordinance requiring citizens and residents of the city to submit to vaccination, is exercising a governmental power, and is, there-

**Restricting  
Equity of  
Redemption**

**Municipal  
Bonds,  
Conditional  
Bid**

**Negligence of  
Office,  
Vaccination**

**MUNICIPAL CORPORATIONS (Continued).**

fore, not liable to a citizen who may sustain damage on account of impure vaccine matter negligently administered to him by one of the officers or agents of such corporation.

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**NEGLIGENCE.**

That people who use electricity are practically quasi-insurers at certain times and places was held by the Kentucky Court of Appeals in *Overall v. Louisville Electric Light Co.*, 47 S. W. 442. The facts were that the plaintiff was an employe of a telephone company, and while working at the top of a pole fixing a wire of his company, it came in contact with one of the wires of the defendant company which was heavily charged and not properly insulated, from which plaintiff received a shock and was injured. Held, that an electric light company is liable for injuries resulting from its failure to furnish perfect protection from electric currents at points where persons will probably come into contact with its wires, and it is not sufficient to tell the jury that it is the duty of the defendant to observe the highest degree of care usually exercised by prudent persons engaged in the same or similar business to keep the wires so insulated as to be reasonably safe and free from danger.

The question as to how long a railroad company can block a crossing and the right of pedestrians to cross through cuts in the trains was before the Supreme Court of Pennsylvania in *Golden v. P. R. R. Co.*, 41 Atl. 302. It appeared that the plaintiff, a child of seven years, came to the crossing and found it blocked by the defendants' train, which block had been maintained for nearly a half-hour. The boy then went across the pavement to a point where there was an opening between the cars, and proceeded to cross, when the cars were suddenly backed without any warning, and he was injured. Held, that the block was unlawful, and that the above facts constituted negligence on the part of the defendant company.

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**PARENT AND CHILD.**

It is familiar law that services rendered by a child, even though married and presumed to be owing to natural affection, and not to compensation promised; and that loose statements of intention to pay, made by deceased parent, are not sufficient to rebut the presumption.

## PARENT AND CHILD (Continued).

*Dash v. Inabinet*, 3 S. E. (S. C.) 297, is a recent close case, in which the Appellate Court thought there was some evidence of a contract, which should have been left to the jury to pass upon.

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## PARTNERSHIP.

A and B became partners in the work on a public contract awarded them by a municipality. B went to the municipality for the purpose of closing the contract and furnishing the necessary security. The municipal authorities, having received from a third person false information as to the financial standing of A, refused to close the contract with him as a party. B did not inform A of the reasons for this action and without A's knowledge proceeded to close the contract in his own name. The Circuit Court for the Western District of Pennsylvania (*Miller v. O'Boyle*, 89 Fed. 140) properly sustained a bill for a preliminary injunction filed by A, on the theory that B was to be regarded as trustee for the firm, and that A might prevent B from excluding him from participating in the management of the business.

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## PROPERTY.

In a suit to foreclose a mortgage made to secure the payment of a promissory note, it appeared that the payee attempted to make a gift of the note to the defendant under the following circumstances: The payee, shortly before committing suicide, endorsed the note in blank and placed it in an envelope addressed to the defendant, which was left upon a table. The envelope contained also a letter giving directions as to the delivery of another letter. This sealed envelope was found by the defendant, when attracted to the room of the payee by the fatal pistol shot. It was picked up by the defendant and handed by him to the plaintiff, the executor of the suicide. A week or so before, the suicide had said to the defendant, referring to the note, "I might as well give it to you." The Supreme Court of Oregon held that although it was clear, from the evidence, that there was an intention to make a gift, yet that none had actually been made, since the second requisite of a valid gift, delivery, was not here satisfied. The alleged donor never parted with his dominion over the note; it remained under his absolute control: *Liebe v. Battman*, 54 Pac. 179.

## REAL PROPERTY.

In *Taylor v. Clark*, 89 Fed. 7 (Circuit Court, S. D. California), it is held that a bill to quiet title will not be entertained by the Federal courts where the defendant is in full possession of the land. This is true, though the statute law of the state in which suit is brought gives a right to maintain such a bill under such circumstances (see *Felton v. Justice*, 51 Cal. 529), because the Federal courts are governed in their equity jurisdiction by the practice of English Courts of Chancery. It has been held by the United States Supreme Court that a bill to quiet title could be maintained when neither of the parties was in possession of the premises: *Holland v. Challen*, 110 U. S. 15.

Property was conveyed by a deed containing a covenant that there should not be erected on the premises any building other than for the use or purpose of a private dwelling. This was a bill in equity brought to restrain the erection of a three-story frame flat house, with five rooms on a floor, suitable for three families, on the ground that it was not a "private dwelling" within the terms of the covenant. The Court of Chancery of New Jersey granted the bill.

Deed, Covenant, "Private Dwellings," Apartment House

Chancellor McGill said, "It is manifest that her [complainant's] purpose was to preserve the privacy and residential character of the property. . . . Not only does the term, 'a private dwelling,' by force of the word, 'dwelling,' restrict the character of buildings, by eliminating all buildings for business purposes, such as stores, factories, and the like, but it also, by force of the word 'private,' excludes buildings for residential purposes of public character, such as hotels or general public boarding and community houses. At the argument, counsel for the defendants characterized a flat as a number of private dwellings, built one upon another. If this is a true definition, such a building is objectionable to the restriction, because but a single private dwelling is contemplated, not a bunch of private dwellings. The restriction is to 'a private dwelling,' in the singular, not to a building of private dwellings in the plural. I think, also, that the flat cannot be deemed a private dwelling. It is really a community house, designed for the accommodation of more than an individual and his household, which I consider to be the sense in which the word 'private' is to be taken:" *Skillman v. Smathehurst et ux.*, 40 Atl. 855.

## REAL PROPERTY (Continued).

The same result was reached in *Gillis v. Bailey*, 21 N. H. 149 (1850), in the interpretation of the words, "a single dwelling house."

The Supreme Court of Michigan has recently held that where real property is deeded to a man for the express purpose of his obtaining credit on the strength of his ownership of the land, he to deed the property back to the grantor during his life, or to devise it to him in his will, the grantee takes but a life estate, and that on his death the grantor is entitled to the land as against all but *bona fide* purchasers and creditors of the grantee. The wife of the grantee was held not to be a *bona fide* purchaser who could claim as against the original grantor, where it appeared that the wife had voluntarily given her husband certain moneys and he had said that she should have everything he owned in return, and had deeded the premises a few days before his death: *Williams v. Williams*, 76 N. W. 1039.

In *Davis et al. v. Monroe*, 41 Atl. 44, the question at issue concerned the title to a certain piece of land. Appellant had deeded another tract of land to one Cobb, but by fraud the deed was made to include the land in question, and was so recorded. The Supreme Court of Pennsylvania held that the recording of the deed was not constructive notice of the grantee's claim under it, and the statute of limitations did not, therefore, begin to run. The record is notice only to those who are bound to search for it, including parties subsequently dealing with the land, or concerned with its title. The grantor is under no obligations to see to its recording, or to examine the terms thereof; consequently it is no notice to him.

In *Lewis v. Bryce*, 41 Atl. (Pa.) 275, a devise to testator's daughters "during their lives—said property to descend and be inherited by said daughters' children and their heirs forever"—was held to vest only a life estate in the daughters, the court holding that the word "their" referred back to the word "children," and not to the word "daughters;" so that the case was not within the rule in *Shelley's Case*.

## STREET RAILWAYS.

The Chicago General Railway Company filed a bill to enjoin Carter H. Harrison, and others, representing the city of Chicago,



**STREET RAILWAYS (Continued).**

**Street  
Railway,  
Permit to  
String Wires,  
Construction** from cutting wires of complainants which were used to supply private motors in the lumber district of the city. The original permit to put up the wires was for "necessary feed wires" along the street car route. Such permit was held not wide enough to include the distribution of power to private motors. The proposed action of the mayor was accordingly not in violation of any charter right of complainants, and the injunction was refused: *Chicago St. Ry. Co. v. Ellicott*, 88 Fed. 941.

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**SURETYSHIP.**

It is a familiar principle of suretyship law that one of several co-sureties, who signs upon the express condition that the others sign, is not bound where the others do not sign, unless the obligee had no notice of the condition. This was applied to exonerate the surety in *Middleboro Bank v. Richards*, 76 N. W. (Neb.) 528, the signature of the non-assenting surety, per an unauthorized agent, being, in the opinion of the court, a doubt which should have put the obligee on his guard. Nor was the subsequent ratification (by assent) of the unassenting surety sufficient to bind those who had stipulated for his original signature.

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**TELEGRAPH COMPANIES.**

The Court of Civil Appeals of Texas, in an action against a telegraph company for negligence in failing to deliver a message, whereby plaintiff was prevented from attending the funeral of his child, held that the **Non-delivery  
of Message,  
Notice** message—"Your child very low; come at once"—was sufficient to put the company on notice that the child might die at any moment, and called for prompt delivery: *Western Union Tel. Co. v. Waller*, 47 S. W. 396.

The same court, in *Western Union Tel. Co. v. Sweetman*, 47 S. W. 676, holds that the telegraph company is charged with **Notice of  
Relationship** notice of the relationship existing between the addressee and a sick person, concerning whom the telegram is sent, whether such relationship is disclosed therein or not.



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CAN THE RIGHT TO VOTE STOCK BE SEPARATED FROM ITS OWNERSHIP? Two or more stockholders in a corporation sometimes wish to combine to elect the officers of the corporation, and, in order that their stock may be voted as a unit, they enter into what are known generally as Voting Trust agreements. How to make these agreements binding upon the parties to them, has been a puzzling question. The difficulty in all the devices that have been tried finally resolves itself into the question of the separability of the right to vote stock from its ownership, and upon this question the opinions are more or less confused. Public policy has insinuated itself where it has no business; the distinctions between trustee and agent have been left to take care of themselves; and the not unusual lack of discrimination between *right* and *power* is again exhibited.

Some of the cases declare illegal all agreements by which the right to vote is separated from the ownership of stock—a result due, perhaps, to the undertone in the books, which deprecates control by one man or clique and favors minority representation. Judges, in their eagerness to protect persons from what turn out to be ill-advised contracts, have lazily seized upon public policy as their reason. It will be found, however, upon examination of the cases, that in not one of them was the illegality of these agreements really involved. In *Hafer v. N. Y. L. E. & W. R. R.*, 14 Wk. L. B., 68 (1885), the court decided that the contracts were void “both upon the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder cannot barter away the right to vote upon his stock.” The purpose of the agreement was improper, its object being to give one corporation control over another. In the *Shepaug Voting Trust Cases*, 60 Conn. 553 (1891), there was a secret agreement underlying the pooling agreement, the object of which was to secure profits from certain construction contracts in the extension of the railroad; and the Voting Trust was, therefore, condemned, because its purpose was repugnant to the fiduciary relationships of the stockholders to one another. In *Gage v. Fisher*, 65 N. W. (N. Da.) 809 (1896), the object was to give an office to one of the parties to the contract, and, of course, this would not be aided by a court of equity. *Harvey v. Linville Imp. Co.*, 24 S. E. (N. Ca.) 489 (1895), involved only the question of revocability of proxy. In *Vanderbilt v. Bennett*, 6 Pa. Co. Court R. 193 (1888); *White v. Thomas Inflatable Tire Co.*, 28 Atl. (N. J.) 75 (1893); *Ohio & M. R. Co. v. State*, 32 N. E. (Ohio) 933 (1893), although the *dicta* were strong to the effect that such agreements were absolutely void, the question of illegality was admittedly not involved. Professor Baldwin, in 1 Yale Law Journal, argues that these agreements are illegal.

On the other hand, some cases see nothing illegal in such agreements, but these again used language broader than the cases justified. It was merely a question of revocability of proxy in *Griffith v. Jewett*, 15 Wk. L. B. 419 (1886). *Mobile & Ohio R. R. v. Nicholas*, 98 Ala. 92 (1892), and *Smith v. San Francisco & N. P. R. Co.*, 47 Pac. 582 (1897), were cases in which it was not attempted to separate the right to vote stock from the ownership of the same. It may be noted here that a reason, perhaps, for not holding some of these agreements illegal at the instance of third parties, is the uselessness in doing so; for the parties to them could do just what the agreements say and their actions could not be assailed, it being impossible to go into the question of motives. And in some cases, even if the contracts could be said to be illegal, the corporation or a minority stockholder may not have a standing in court to object.

Mr. Lilienthal (in 10 Harvard Law Review, page 428) not only rejects the theory of illegality, but contends for a doctrine that

would view with utter indifference a result by which a corporation could be run entirely by outsiders. On page 433 he says: "Again it will be admitted that the ownership of shares represents a double right—the right to vote and the right to participate in profits. If it be lawful to sell an interest in the latter right, as it undoubtedly is, why not, then, in the former?"

If such contracts are illegal because contrary to public policy, why is not a partnership holding a majority of stock also illegal? On the other hand, shall we agree with Mr. Lilienthal that the right to vote may pass from hand to hand, regardless of the ownership of stock? Because of the difficulty that one or the other view has with such questions as these, and in view of the vagueness of the cases, it may be worth while—if for no other reason than that of definiteness and clearness of thought—to look for an underlying principle; and, in looking for such a principle, it were better to avoid the too convenient reason of public policy, however fascinating it may be to talk of the duties of shareholders to one another and of the confidence reposed in them by the state.

It makes no difference what shape the scheme to separate the right to vote from the ownership of stock takes. Whether it be a proxy to vote the stock, or an agreement with adequate consideration, or a transfer of the stock to a trustee, it seems that the contention that the right to vote is separable from the ownership of stock includes the assumption that it is a property right. Is it? Some rights are ours merely because we are members of society. Such is the right not to be assaulted, belonging as it does to every human being merely as such. So there are rights which constitute privileges of a certain class, belong to men because they are members of one or another class. The right to vote, for instance, is a man's, because he is a citizen or a member of a club or the owner of shares in a corporation. Just as the right not to be assaulted is mine because I am a member of society, so the right to vote stock in a corporation is mine because I am a member of the corporation. Rights of the latter sort belong to fewer individuals than do the former, because their classes are less inclusive; but they are, nevertheless, precisely the same sort of rights. The classes may be various—the nature of the right always remains the same. It is purely and absolutely *personal*, and, from its very nature, is incapable of being separated from the man. It would be difficult to think of the right not to be assaulted as transferable; the alienability of the right to vote is just as much of an impossibility. These rights all belong to a man, because he has brought himself within one or another class, and for no other reason. If he ceases to be a member of the corporation, his right ceases. An outsider may get the right only by becoming a member. The language of the cases supports such a theory. "The franchise is an inseparable incident of the ownership of stock:" *Lafferty v. Lafferty*, 26 Atl. (Pa.) 388 (1893). "The right to vote is an incident of the ownership of stock, and cannot exist apart from it:" *Griffith v.*

*Jewett*, 15 Wk. L. B. 419 (1886). "It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of stock:" *Shepaug Voting Trust Cases*, 60 Conn. 553 (1891). "The right of voting stock is inseparable from the right of ownership. The one follows as a sequence from the other, and the right to vote cannot be separated from the ownership without the consent of the legal owner:" *Tunis v. Hestonville R. Co.*, 24 Atl. (Pa.) 88 (1892).

It is objected, however, that the right to vote is sometimes dissociated from the ownership of stock. A proxy is said to be such a dissociation. It is true that the *power* to vote is separated, but the *right* ever remains in the shareholder. The mere fact of agency does not give the agent a *right*. If it does, why may he be deprived of it without his consent—as, for instance, when I revoke his authority? The truth is that in such a case I do not destroy any *right* that is in the agent. I merely take away a *power*—withdraw my consent from the personal relationship which cannot exist against my will: *Griffith v. Jewett*, 15 Wk. L. B. 419 (1886); *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91 (1887). An owner of property makes me an agent to sell. Do I get the right to sell, or merely the power? There is no objection, of course, to an agent acquiring a right from a contract of agency; but that is a different question.

Where the power is coupled with an interest, the right to vote is then in the person who is to exercise the power. He becomes an owner, and acts in his own name. Such are the cases of *Shelmerdine v. Welsh*, 20 Phila. 91 (1893), and *Mobile & Ohio R. R. Co. v. Nicholas*, 96 Ala. 92 (1892), in which cases the creditors are really pledgees by the transfer to the trustees, who, as representatives of the creditors, have thus a power coupled with an interest. So when stock is held jointly, and one joint owner is given the authority to vote, the right is not separated from the ownership: *Hey v. Dolphin*, 92 Hun. 230 (1895); *Lafferty v. Lafferty*, 26 Atl. 388 (1893); *Smith v. San Francisco & M. P. R. Co.*, 47 Pa. 582 (1864).

There is an apparent dissociation when the transfer book is closed some time before the election. One who transfers after the books are so closed may no longer have an interest in the stock and yet may be allowed to vote. It has been held that a vote by the transferor under such circumstances, no objection being made, is not void. But there is no case, I believe, which holds that the transferor has a *right* to vote as against the transferee. Is it contended that he will be entitled to vote if the transferee challenges his right to it? In *American National Bank v. Oriental Mills*, 23 Atl. 795 (1891), it is said that the holder of the legal title "would have been bound to vote in accordance with the wishes of the holders of the beneficial interest." Why would not the transferor who has not even got legal title be also bound so to vote? It is submitted that in these cases the transferor is nothing more than an agent and that

the *right* of voting is never in the transferor as against the transferee.

The ownership of shares does not "represent a double right—the right to vote and the right to participate in profits," any more than it represents also the right to sell, the right in certain cases to be a director, or the right to sue for mismanagement, and although the right to dividends, for instance, may be alienable, it is by no means inconsistent that another right, as that of being a director, is not alienable.

If the right to vote is a property right it is admittedly assignable. And if it may be the subject of sale, why not of gift? But no case or writer has ever intimated that the owner may part with the right by gift. Indeed, all who have touched upon this part of the subject affirmatively lay down that there must be a sufficient consideration. Why in the world a consideration is insisted upon it is hard to understand, unless it be upon the belief (as it is sometimes laid down in the books) that a power of attorney given for consideration is not revocable. If so, it goes upon a proposition which can mean nothing more than that the power must be coupled with an interest. A question of contract is not necessarily involved and talk as to consideration is irrelevant. It deserves notice that *Fisher v. Bush*, 42 N. Y. 641 (1870), the case mostly relied upon in this connection, is not satisfied with mutual promises—a fact indicative, perhaps, of the inseparability of the right to vote, for there can be no objection to the adequacy of a promise as a consideration.

With these views none of the cases are in conflict. We may, indeed, believe that such contracts are not illegal; we will hesitate, however, to concur in a theory which will give control of a corporation to persons who are not shareholders in it.

*George Stern.*

Philadelphia, 1898.

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CORPORATIONS; STATUS OF STOCKHOLDER OF NATIONAL BANK; SUBSCRIPTION INDUCED BY MISREPRESENTATION. In *Wallace v. Hood*, 89 Fed. 11, the receiver of a national bank sued to recover an assessment alleged to be due by defendant as a stockholder. The assessment had been duly made under Secs. 5151 and 5234 of the Revised Statutes. The defence was that the shares in question had been repurchased from original holders by the bank to keep up its credit, the bank's funds being used for the purpose and the stock transferred into the names of irresponsible employes; that the defendant, in ignorance of these facts, was induced to purchase the stock by the fraudulent statements of the president as to the bank's condition; that in spite of diligence he had been prevented by false bookkeeping from ascertaining the true condition of the bank until after the appointment of the receiver; and that he had then learned that the corporation had been insolvent when the stock was sold to him, and that, in point of fact, no part of the capital had ever been paid for in cash, as required by the National Banking Act.

He tendered his certificate to the receiver and demanded repayment of what he had paid for the stock. The tender and demand having been refused, the defendant presented with his answer a "cross-petition" praying for a recovery of the purchase money. To the defence, based upon the purchase by the bank of its own stock, the court opposed the principle of *National Bank v. Stewart*, 107 U. S. 676 (1882), and of *Bank v. Matthews*, 98 U. S. 626 (1878), holding that the stock was not thereby made void and that upon a subsequent sale the proceeds went into the bank and restored its capital for its creditors. As to the fraudulent misrepresentations, the court cited *Upton v. Englehart*, 3 Dill. 496 (1874), and Judge Dillon's comment therein upon *Oakes v. Turquand*, L. R. 2 H. L. 325 (1886). While conceding that there may be cases in which a stockholder can rescind the contract of purchase made voidable by the fraud of the corporation's officer, the court thought that such a right could never be asserted where the rights of corporate creditors were concerned, those rights having attached during the time that the defendant was a stockholder: *Bank v. Newbegin*, 20 C. C. A. 329 (1896); *Stuffelbeam v. De Fashmutt*, 83 Fed. 451 (1897); *Bank v. Matthews*, 29 C. C. A. 491 (1897). The court labored to justify this result on a theory of estoppel, that the stockholder had been held out as such by the official registry. Obviously the true explanation is that afforded by partnership law and has nothing to do with estoppel. Where B is induced by A's fraud to become his partner, B is liable jointly with A to all creditors whose debts accrue during the partnership. The liability results from the status and corresponds in each case to a legal right in the creditor which prevails over the partner's or stockholder's equitable right of rescission. The doctrine of estoppel or holding out might apply if the defendant were *not* a partner or a stockholder. It can have no application where, as here, he is such in fact and in law. If this principle had been recognized the court would have been spared the task of separately discussing the "counter-petition," which it disposed of on the authority of *Sheafe v. Larimer*, 79 Fed. 921 (1897). The court also made short work of the defence based upon non-payment of the original capital, citing *Louisville Trust Co. v. L. N., Etc., Co.*, 22 C. C. A. 378 (1896); *Casey v. Galli*, 94 U. S. 673 (1876); *Handley v. Stutz*, 139 U. S. 417 (1890).

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INSURANCE ; INTEREST IN THE LIFE INSURED. The Supreme Court, Special Term, of New York, recently had before it a case involving the interest necessary to maintain an action upon a policy of life insurance. A had been lawfully married in Ireland. He left there, his wife living, and came to New York, where he met the plaintiff and became engaged to her, she not knowing that he had a wife living. He was a member of a beneficial association and had designated the plaintiff as beneficiary in case of his death. The association paid the money into court on A's death, and it was claimed by the plaintiff, and the representatives of A's wife, deceased



after A's death. Held, that the plaintiff was entitled to the money. Although the court did not think it necessary that the plaintiff should have an insurable interest in the life of A, yet it was of the opinion that she had such an interest: *Bogart v. Thompson*, 53 N. Y. Suppl. 622 (1898).

It is well settled that a woman who is engaged to be married to a man has an insurable interest in his life: *Chisholm v. Insurance Co.*, 52 Mo. 213 (1873). But that rule proceeds upon the view that there is a legal contract to marry, which was absent in the principal case. The reason is that the woman in such a case may expect an advantage to result from the continuance of the life insured.

Just what constitutes an interest in a life, in the sense required by the law to support a policy of life insurance, has been much debated in the past. It was once held that the interest required was such as could be the subject of a contract of indemnity: *Godsall v. Boldero*, 9 East. 72 (1807). But life insurance is no longer considered in the light of indemnity: *Dalby v. India & London Life Assurance Co.*, 15 C. B. 364 (1854). And it has been decided that the interest must be a pecuniary interest: *Halford v. Kymer*, 10 B. & C. 724 (1830); *Singleton v. Insurance Co.*, 66 Mo. 63 (1877). But the weight of authority in this country is the other way: *Lord v. Dall*, 12 Mass. 115 (1815); *Insurance Co. v. Kane*, 81 Pa. 154 (1876); *Loomis v. Insurance Co.*, 6 Gray, 396 (1856); *Warnock v. Davis*, 104 U. S. 775 (1881).

In a case analogous to the principal case it was held that a woman who lived with a man as his mistress, although he had a wife living, has an insurable interest in his life, since she has a reasonable expectation of some pecuniary advantage from the continuance of it: *Lampkin v. Traveler's Insurance Co.*, 52 Pac. (Cal.) 1040 (1898).

If the reason assigned in the cases which allow a woman to insure the life of her betrothed, viz., the existence of a binding contract from which some advantage may be expected, is valid, then it seems that in a case like the principal case the plaintiff would not have an interest, for there was no binding contract to marry. And in a case like *Lampkin v. Traveler's Insurance Co.*, *supra*, it is hard to see how the plaintiff had any expectation of advantage from a continuance of the life insured and a consequent continuance of the illicit relationship between them which the law would recognize. It certainly would not enforce any obligation arising out of such a relation, and it is a well-established maxim that the law will not give effect indirectly to what it will not enforce directly. And if any one should be permitted to take advantage of the illegal relation, it should be the insurance company, which has been led to believe the plaintiff was the wife of the insured.

But it seems that the true explanation of these and kindred cases lies in the fact that *no interest* is required in cases where, from the relationship of the parties, it is safe to conclude that the contract of insurance was entered into *bona fide*, and that it was not a subter-

fuge to support a wagering transaction. It is said in many of the cases that there is a *presumption* of interest in cases of close relationship. The interest is purely sentimental. If that be so, then it would follow that in any given case this presumption could be rebutted by evidence to show that the parties were estranged or, *per contra*, the same presumption could be raised by showing an intimacy between the parties. But as matter of fact, no court would listen to such an argument. The courts have laid down hard and fast rules that there are certain relationships which give rise to this presumption. Therefore, it seems to be an improper use of terms to call it a presumption. It is the same thing as saying that in such cases no interest is required.

The conclusion from the authorities seems to be that whenever you have such a relationship between the parties as insures good faith and fair dealing, then no *interest* is required to support a policy of life insurance. These relationships have been confined by the courts to marriage, persons under contract to marry, persons living together as man and wife, and near degrees of consanguinity.

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PARTNERSHIP; LIABILITY OF ESTATE OF DECEASED PARTNER. *Thompson v. White*, 54 Pac. 718, is a most interesting case. In it the Supreme Court of Colorado had before them a suit on a joint book account and on joint promissory notes and checks, given to evidence what was, in large part, a partnership debt of the makers. One of the debtors died, and judgment was entered against his executrix and the survivors. The question was whether the judgment against the executrix could stand. At common law the contract of the creditor with the partner is a joint contract. and, in a case like the present, the survivors alone would be liable. Obviously the theory of a joint contract is an inconvenient theory to apply to a mercantile relation. What was really required was a recognition that the contract, though joint in form, was several in substance. Lord Mansfield perceived this, and decided, *Rice v. Shute*, 5 Burr. 2611 (1770), accordingly. Instead of developing his theory, courts of law continued to treat the contract as joint, while courts of equity (instead of boldly declaring all contracts to be several in equity, which would have been at least a coherent doctrine), undertook to treat the contract as several only in partnership cases, in which one of the partners has died. The same contract, joint one day in law and equity, was next day joint at law and several in equity: See opinion of Lord Selborne, in *Kendall v. Hamilton*, 4 App. Cas. 504 (1879), at p. 537, *et seq.* Lord Eldon had expressed surprise at this doctrine years before in *Ex parte Kendall*, 17 Vesey, 514 (1811). In some jurisdictions, in order to reach the estate of the deceased partner in equity, it was declared necessary to aver and prove that there were no partnership assets and that the other partners were insolvent. This, again, was obviously an anomaly. The legislatures then began, in haphazard fashion, to remedy the evil by making (in general) all contracts



several as well as joint, unless expressly declared to be joint: See Parsons (J.) on Part. § 82, *et seq.* The contract of a creditor with a partnership is, of all others, the one to which such legislation should be held applicable. Yet the Supreme Court of Colorado, in the case before us, actually decides that such contracts are the only ones to which such statutes do not apply, and proceeds to insist that the plaintiff must aver a failure of partnership assets in order to reach the estate of the deceased partner. There can be no doubt that the court is right in holding that there cannot be (as seems to have been urged by counsel) one rule applicable to contracts evidenced by formal writings, and another applicable to oral agreements and open accounts. It is submitted, however, that in both cases the legal right of the creditor against the separate estate of each partner, dead or alive, ought to be recognized to the full. Except where authority requires the application of the mischievous "bankruptcy rule," the firm creditor may seize and sell the separate estate. (See *Meech v. Allen*, 17 N. Y. 300 (1858). See, also, note on p. 367, Ames's Cases on Part ). If he may do so when all the partners are alive, he ought, on principle, to have the same rights when one is dead; and this is especially true where a statute has dissipated that mediæval conception, the "joint contract." These considerations seem to answer the suggestion of the Colorado court, that "if a firm debt cannot be paid out of the separate property of a deceased partner except upon a certain contingency, the partnership contract does not impose an absolutely several liability." The answer is that the partnership debt *can* be paid out of the separate property of a partner under all circumstances, except in the single contingency represented by the bankruptcy rule.

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PRACTICE ; INVALIDITY OF APPOINTMENT OF MASTER IN DIVORCE TO FIND FACTS AND SUGGEST DECREES. Legislation in Pennsylvania, while comprehensive upon the leading subject of stating the causes of divorce, has provided meagerly for proceedings in the courts. The second section of "An Act Concerning Divorces" (March 13, 1815, P. L. 150), provides for a petition or libel, with an affidavit of specified averments, the issue of a subpoena and the service of the same, and, if the respondent be not found, for an *alias* subpoena and publication, and for appearance and hearing, and for an issue to be tried by a jury. This section ends with the provision " . . . but when neither of the parties requires an issue to be so formed, the court may inquire and decide upon the case in the presence of the parties; or, if either of them will not attend, then *ex parte* by examination of witnesses on interrogatories, exhibits or other legal proof had either before or at the hearing."

With such mere outlines of procedure, the details of practice were conducted for many years under rules of the Courts of Common Pleas, and in accordance with decisions upon questions that

arose in the course of litigation. The text and notes in II. Tr. & H. Pr., § 2334, *et seq.* (Brightly Ed. 1880), indicate the respective sources of authority for carrying on such suits, and the successive steps to be taken therein. In the county of Philadelphia the four Courts of Common Pleas adopted, to go into effect the first Monday of January, 1884, a carefully drawn set of rules—in some regards an entirely new system—regulating the practice in divorce. Prior to that time, cases in which there was no demand for a jury trial were referred to an examiner (under certain stipulations as to interrogatories, notice, &c.), and witnesses were examined before him and their testimony reported to the court. One important innovation made by the new rules was the substitution of a master instead of an examiner. The language of the rule on this point is, that “when a case is ready to be proceeded with, either upon answer not demanding a trial by jury, or *ex parte*, a master may be appointed by the court upon the written motion of either party.” Minute directions for all the proceedings before the master are given in further sections of this rule of court, the main features of which were apparently intended to give actual notice to the respondent, who had been served only by publication, and to compel a careful examination in detail of each witness upon “all matters relevant to a just and proper determination of the cause.”

It is further made a duty of the master to “report his proceedings and the testimony, together with his opinion of the case . . . and to file the same in the office of the prothonotary.”

The manifest purpose of this change in practice was to secure care and thoroughness in matters of such vital social importance as divorces. Until very recently no question has been raised as to the power of the courts to appoint such an officer. Now, however, this has been considered and decided. A case contested before a master, to whose report exceptions were filed and after argument dismissed by the Court of Common Pleas, and the divorce granted, was appealed by the respondent to the Supreme Court of Pennsylvania. There was no assignment of error to attack the validity of the appointment of the master. The contention of the appellant was upon very interesting questions as to the issue of desertion stated in the exceptions which had been considered by the Court of Common Pleas, and the full and able argument of counsel made no reference to the right to appoint a master or to the scope of his power when appointed.

The Supreme Court, however, of its own motion, decided that, while the court below might appoint an examiner to take testimony and report it, there is no authority under the act to appoint a master to find facts and suggest a decree.

As this decision ends a practice which had existed for about fourteen years, it would be interesting to, *in extenso*, quote the exact language of the judge who delivered the opinion of the Supreme Court. But the whole extract on this point would be too long for

this note. The conclusion of the court is in substance as just stated. Judicial responsibility cannot be evaded by shifting it over to a member of the bar. The following sentence may be given from the opinion of Dean, J.: "Therefore, of whatever drudgery the court of original jurisdiction may relieve itself in this class of cases by the appointment of an examiner, neither it nor we can escape the burden of a careful consideration of the evidence to ascertain if it does in very truth establish the statutory grounds for a divorce."

While much might be said in favor of the careful and particular requirements of the rule of court, and the advantage of having an opinion from a master who sees the witnesses, hears their oral testimony, reduces it to writing, and forms a judgment from personal observation, yet the determination of the Supreme Court positively uproots the present practice. The rule of court so far as concerns the appointment of a master, and its provision for an opinion suggestive of a decree by him, is absolutely of no effect.

It may be conjectured that hereafter cases will be referred to examiners in accordance with the old practice, since the opinion of the Supreme Court expressly concedes that the Court of Common Pleas may appoint an examiner to take testimony and report it: *Middleton v. Middleton*, 41 Atl. 291.

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INNKEEPERS ; LIENS ; GOODS OF THIRD PERSONS. The Code of South Dakota provides that innkeepers shall have a lien on baggage and other effects belonging to any person who shall abscond without paying his hotel bills. The Supreme Court of that State has held, in the case of *McClain v. Williams*, 76 N. W. 930 (Oct. 18, 1898), that this provision of the code must be construed strictly and that the innkeeper's lien will not attach to goods of third persons brought into the hotel by the guest. The court takes the view that the code supersedes the common law, and to allow the property of the third person to be held for the debt of another would be unconstitutional as depriving one of his property without due process of law. The court holds that to allow such a lien would not be promotive of justice. It is a question, however, whether or not issue might not be joined upon this point. It is a rule in law that where one of two innocent persons must suffer, by reason of the fraudulent acts of a third person, he who has enabled the third person to commit the fraud should be the one to suffer. At common law, the goods of a third person brought into a hotel as the goods of a guest and believed by the innkeeper to belong to the guest would be subject to the lien: *Sneed v. Watkins*, 1 C. B. n. s. 266 (1856); *Singer v. Miller*, 52 Minn. 516 (1893); *Kane v. Prentice*, 13 Ore. 482 (1886); *Covington v. Newberger*, 99 N. Car. 523 (1888). And it is hard to see why this is unjust. The third person by allowing his goods to remain in the hands of the guest enables him to secure credit for board and lodging, and as between him and the innkeeper the latter would seem to have the greater equity. It might also be questioned whether the view of the court in holding that the words

“belonging to any person who shall abscond” applies strictly, is a fair interpretation of the meaning of the code. Would not a common sense interpretation of this expression be that “goods belonging to any person who shall abscond” is merely a general designation of the goods brought into the hotel by such person. The old common law rule seems to be a fair one, all things considered; it has stood the test of time, and it is difficult to understand why a court should strive to construe a statute as antagonistic to it rather than in harmony with it, especially in view of the extraordinary liability to which innkeepers are subjected. It would seem that the court, in its anxiety to protect the rights of the owner of the goods, had rather overlooked the rights of the unfortunate innkeeper.

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## BOOK REVIEWS.

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ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION. By HANNIS TAYLOR. Boston and New York: Houghton, Mifflin & Co. 1898.

We find comprised in these two volumes a clear and comprehensive history of that Constitution of England, which certainly had a strong and direct influence upon the Constitution of the United States, through having moulded the minds of the men who were its makers, even though the former may not have been so exclusively the model of the latter, as Mr. Taylor contends.

In reading the first volume we seem to be listening to a chorus of familiar voices. The powerful accents of Maine, Stubbs, Vinogradoff and Fiske, unmistakable—each in his own way phrasing his own new thought of the old facts, and mingled always with the cadenced English of Green—meet us everywhere. Mr. Taylor has used his authorities copiously, yet he has used them well; and the pleasure of hearing the old voices is not marred by the presence of the new host, who has gathered them about him. That he asks them to do much of the talking cannot but be excused to the listener, by the fact that they talk so very well. Mr. Taylor himself speaks clearly, simply, and carries his theme on steadily to its appointed end. He has written a valuable work, but the ground has been so well covered before, that perhaps the chief advantage of the present work will be found in its simplicity of method and arrangement, which makes a reference to any specific period a very quick and easy matter.

That he is right in his idea that the original binding element of the Teutons was a national and not a geographical one, seems indisputable. In our new idea of an Anglo-Saxon domination of the earth we seem to be undoing, in some degree, the work of the years between ourselves and those ancient Teutonic peoples, again we come to the idea of a tie of race, rather than of physical

propinquity. It is a question if this gradual yielding to subser-viency to the land, to a thing in the place of an idea, was not a stepping aside from the straight path of progress toward civiliza-tion, upon which our ancestors had entered.

In his interesting exposition of the "brand-new idea" of giving the Federal Government the power to execute its laws on the indi-vidual directly, not on the states in their corporate capacity, Mr. Taylor is emphasizing a most interesting element of the situation at the formative period of our Constitution. But, perhaps, it is still more interesting to consider that this federal head, which was so to act, was not a physical fact at all. The states in their union did not, as was the case with other headships of federated states, grant such headship to the largest or more powerful state among them all. This "head" of the makers of our Constitution was not a head at all, but an animating soul, through whose influence all members were controlled and brought to act as one body, without any one being set above or below another.

In view of the immensity of the work undertaken, the long translations from Cæsar and Tacitus of passages more than familiar seems hardly justified, while the profound suggestions of Seebohm and De Coulanges are not allowed to influence the text, but are passed over in a foot note.

To the rather peculiar repetitions of the words and phrases of his authorities, without any apparent fusing or transmutation through his own thought, is added a still more peculiar repetition of the author's own phrases in different portions of the book. As in-stances, we note a repetition of a portion of page 276 on page 282, paragraph 2, and of a portion of page 392 on page 426. It indi-cates the method of composition, perhaps, a little too clearly to be wholly pleasant.

In selecting the more individual portions of the work we should turn to the introduction and to the last chapter. We think that very few will dissent from the statement in the introduction that our Con-stitution is a growth and not a creation. If anyone appears to con-trovert this fact, it is rather because of an inadequate statement of the idea of the almost miraculous crystallization of contemporary thought in that instrument, than to an idea that the thought itself was wholly new. Gladstone was not so shallow as to intend to give to the words "struck off," which are here quoted, the meaning of instantaneously created. That the instrument was "struck off" in a marvellously short time is an undisputed fact. But that no more implies that it was a creation of hitherto non-existent ideas, than the fact that by its formation the new nation of Americans at once sprang into existence implies the creation of a new race of human beings.

The last chapter is very valuable, setting forth, as it does, the last results of constitutional government in England, especially in relation to local self-government and the extension of the franchise. Between these two chapters lie those which set forth the result of

evidently long and unremitting labor and research. And while they add nothing to the reach of our thought or the knowledge of fact on the subject, yet they do give us a clear, interesting and intelligible view of the road over which the English people have passed, in their long pilgrimage of nearly a thousand years, from William of Normandy to Victoria of England. *M. C. K.*

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SHORT STUDIES IN EVIDENCE. By IRVING BROWN. Albany, N. Y. : Banks & Brothers. 1897.

Mr. Irving Browne has collected into a single volume a number of papers on various topics under the law of evidence, which he has contributed at various times to the legal periodicals. No attempt has been made to produce a new work on the law of evidence ; the twelve papers are entirely disconnected and are not even arranged in logical order of sequence. The title gives no idea of the contents and we can do no better than give the separate headings of the essays: Practical Tests in Evidence ; Theology on the Witness-Stand ; Evidence of Declarations and Reputations as to Private Boundaries ; Parol Evidence to Add a Warranty to a Written Sale ; Parol Admission of Contents of a Writing ; Degrees of Secondary Evidence ; Unofficial Entries by Third Persons ; The "Excess and Deficiency Clause" in Bills of Lading ; Of the Disqualification of Parties as Witnesses ; Testimony of Parties on Criminal Prosecution ; Parol Evidence in Respect to Writings Under the Statute of Frauds ; Self-Serving Declarations. Many of these articles were written years ago, one as early as 1857, and great improvement could have been made in the practical value of the volume had some notes been added containing recent cases. Some of the "studies" are very entertaining, notably the first: Practical Tests in Evidence, and the eight hundred cases cited are of use as pointing to certain line of cases. The volume is ordinary size, containing 250 pages, and has appended a table of cases and index.

*J. F. B. A.*

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SELECTED CASES ON THE LAW OF PROPERTY IN LAND. By W. A. FINCH, Professor of Law in Cornell University College of Law. New York : Baker, Voorhis & Co. 1898.

This work, as the preface informs us, "contains a classified selection of cases on the topics usually taught in our law schools in the course on "Real Property," and, as evidenced by the omission of head notes from the cases, is intended for use in those schools.

The analysis of the subject, and the classification of the cases are both excellent, though Chapter 3, of Part III. would seem to be superfluous in view of Chapters 3 and 4 of Part IV., which contain the same titles, illustrated by the same cases. The system of cross references by which one report of a case is utilized to illustrate several different topics seems a good one in view of the space limitation imposed by the author upon himself, though it may be that in



practice it will confuse the young student, and tend to foster his natural propensity to stray off into the by-paths of dicta. It is this very space limitation, however, which detracts most from the value of the work; four hundred and twenty cases being manifestly inadequate to a proper development of the subject, even taking into account the cross references; while the nicely balanced proportions of the several parts, and the symmetry of the work as a whole, negatives the idea that it was not intended to be complete in itself.

Perhaps the most striking feature of the book, the subject considered, is the paucity of English cases; the author might almost have entitled his work "*Selected American Cases*," etc., for a close count reveals only twelve cases from the English reports. In vain one looks for the old landmarks, which for generations have guided the student through the mazes of the common law—for those "*Leading Cases*" which hold in solution whole epochs of legal learning; in place of *Fletcher v. Ashburner* is *Craig v. Leslie*; and even the presence of *Vane v. Lord Barnard* hardly reconciles one to the absence of the Countess of Shrewsbury's case. This is a real fault in the work, for it destroys the historical prospective so necessary to a proper contemplation of the subject. No reason is given for this omission, but we think it is due to the initial fault of attempting to confine so broad a subject within such narrow limits.

Though the author does not say so, it would appear from internal evidence that the work is intended primarily for the use of those students who expect to practice their profession in the state of New York, for more than one-third of the cases are taken from the reports of that state, and the notes contain copious references to the New York Code and Statutes, even when, as on page 711, the note is appended to a case from another state. The very compactness of the treatment, however, which, to the reviewer's mind, is responsible for the faults noticed, will render the work useful, in the hands of a competent instructor, to those who have only a limited amount of time to devote to the subject.

W. E. M.

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TAXATION FOR STATE PURPOSES IN PENNSYLVANIA. By FRANK MARSHALL EASTMAN. Philadelphia: Kay & Brother. 1898.

The subject of taxation—always of interest, at least, to those upon whose shoulders the taxes fall as an unwelcome burden—has again become a subject-matter for fresh study and investigation as a war revenue becomes necessary, and new and untried adventures in government call for increased expenditures in many branches of the administration. Each state has its own system of raising funds to meet the local needs, and thus furnishes an object lesson to all its sister states as to the means and methods of so doing. In this way each state adds its quota to the general knowledge, and, therefore, every such book as this is valuable, inasmuch as it shows how the

legislation upon this subject has developed, from the time when the sale of state lands and the income derived from investments of the state itself were sufficient for the needs of the government, to the present time, when a most elaborate system is necessary. In the development of this system wars have played an important part. The necessity for a greater revenue, which comes with every war, leads to the invention of new methods of getting at the pockets of the people, and legislatures have shown much ingenuity in originating such methods. Pennsylvania is no exception to the rule, and the modern system of taxation in this state dates from the increased expenditures imposed upon the state by the demands of the civil war. Many of the war taxes, it is true, were abolished after the extraordinary expenses of the war itself had ceased, but they had given a model upon which to form new enactments when the expenditures again outran the income of the state.

Whether or not we agree with the author of the treatise—that the system of taxation in Pennsylvania should be retained in its entirety until any change which may be proposed has been shown, by absolute demonstration to be its superior—we think we may safely assert that the system is well set forth by him. The arrangement and classification are those with which we are all familiar. There is no attempt at treatise making—rather we have a compilation, which performs the office of such a work in a simple and clear manner. The experience of the author in connection with his official duties has led him to the use of a somewhat peculiar manner of stating his own conclusions in some of the passages where he ceases to be the mere compiler and becomes the author. The sensation given is that of an inaudible interlocutor, with an audible voice in answer. This manner, however, has its advantages, as one often seeks a book of this sort in order to find an answer to some definite question, and the book which answers it clearly is only too rarely found. As a compendium of our tax laws and an answer to many such questions, this book appears to have a very definite value and place of its own.

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SELECTED CASES ON THE LAW OF PARTNERSHIP. By FRANCIS M. BURDICK. Boston: Little, Brown & Co. 1898.

The ever-growing list of “selected cases” has received a valuable addition on the subject of Partnership, through the efforts of Professor Burdick, of the Columbia Law School. The success of his Cases on Sales has paved the way for the favorable reception of the Partnership cases, and the latter is fully deserved.

The cases selected are in the vast majority American and of very recent date, the collection, in the former respect, being in striking contrast to that of Professor Ames, of Harvard, in which more than three-quarters of the cases are from the English courts. While the historical perspective of the law is not so strikingly exhibited to the student by the modern cases, yet the more desirable



object, perhaps, of presenting the law in its present working attitude is attained.

The book is divided into nine chapters, as follows: I., The Formation of a Partnership; II., Partnership as to Third Persons; III., The Nature of a Partnership; IV., Powers of Partners; V., Rights and Remedies of Creditors; VI., Duties and Liabilities of Partners *Inter Se*; VII., Dissolution of Partnership; VIII., Accounting and Distribution; IX., Limited Partnership.

These chapters are divided into very minute sections, and it might be objected that the work of subdivision is overdone. Some of the sections could easily be joined with others without damage to the arrangement. In fact, it is difficult for the student to remember, some time after he has read a case, anything more than the general division under which it came, and an attempt at too great a subdivision of a subject is apt to lead the student to believe that each particular subsection is governed by a separate rule of law, and that each of these rules must be learned separately instead of being deduced from the general principles of the law on the subject.

The absence of notes to the cases, showing to what extent they have been followed, is to be remarked, but may be explained by the extremely recent date of many of them. The practice of adding short foot notes to cases in these collections cannot be too strongly commended. Some of the cases are too greatly condensed, however, and all the opinions in *Cox v. Hickman*, 8 H. L. C. 268 (1868), with the exception of Lord Cranworth's, have been omitted. But on the whole the cases are well selected and interesting, and would form the basis of a valuable course in a law school.

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## AN INQUIRY INTO THE NATURE AND LAW OF CORPORATIONS—PART II.

*The Relation of the State to the Corporation and the Persons  
Composing it.*

As an artificial person existing in the law as the subject of property rights and in its essence differing only from a natural person in that personal rights cannot be predicated of it, a corporation cannot be deprived of its rights, properties or immunities without due process of law ; nor can any State pass any law impairing the obligation of its contracts. These constitutional restrictions do not, as is well known, apply to the general rights of property, such as the general rights to contract, to sue, to buy and sell lands, etc., and such rights, therefore, so far as such special provisions are concerned, continue subject to the control of the State ; but these provisions do apply, not only to the right of a person to property vested in him, but also to the right to freely use such property, as it is in such right of user that the ownership of the property is found. A corporation, therefore, can no more be arbitrarily deprived of the right to sell its real estate than

of the real estate itself, as in either case it would be deprived of a vested property right without due process of law; although, so far as these special provisions are concerned, it can be deprived by law of the general right to deal in real estate, excepting such real estate as to which its property rights had become vested. Similarly, with regard to its contractual rights, not only cannot its actual contracts be impaired by any State law, but it cannot be deprived by law of its right to make contracts for the use of the property belonging to it, since such latter right is an incident to the ownership of the property and vests upon its acquirement. An incorporated livery stable company, for instance, can no more be deprived of its right to hire or sell its horses, than of the horses themselves, without due process of law, since the ownership of such horses really consists in the right of the corporation to use, to hire and to sell them. It would hardly seem necessary to deal with this question, but that it is apparently often assumed that, by the very act of incorporation, the state acquires some right to regulate the exercise by a corporation of its special—that is—vested property rights. That the State does often possess such right with regard to special corporations is true, but such right in such cases flows not from the artificial character of the corporation, but from the public character of the franchise it enjoys. The State always possesses the right to regulate the use of a public franchise, whether such franchises be vested in a natural or an artificial person, and it is this right to regulate business of a public character usually, if not invariably, conducted by corporations, which is confused with the right to regulate the business of a corporation as such. A railway as a public carrier is subject in the exercise of its public franchise to the reasonable control of the State, but so also would be a natural person vested with a like privilege and duty. Irrespective, however, of any such privilege or duty, the *vested* property rights of a corporation should evidently be governed by the legal doctrines applicable to the property rights of all persons. But a moment's consideration will show that the *general* property rights of a corporation are on a different basis. A corporation is created

when any persons are authorized to act under an assumed name; and, in the absence of any special limitation, we find that such persons are thereby authorized to exercise all the property rights under such name, but it is plainly within the power of the State, upon creating such corporation, to fix or limit such property rights and, as a necessary consequence, to subsequently alter such rights by proper amendment of the corporate charter, for a corporation cannot, as we shall see, be said to possess any vested right therein.

A corporation we have found to be merely the result of the action of the state in conferring upon various persons the right to act under an assumed name; if, therefore, this right thus conferred were abrogated, the corporation would itself cease to exist; or, if such right were modified, would continue to exist, if at all, under changed conditions. And, plainly, this right of such persons to act under the corporate name cannot be maintained by the corporation itself, for such corporation, being but the result of such right, cannot in any way maintain that upon which it depends for its very existence. The inviolability of a corporate charter, therefore, if a fact, must be found in the relations by such charter established, not between the state and the corporation, but between the state and the parties to whom such charter is granted, to wit, the persons composing the corporation. What, then, are such relations? The essence of a corporate charter is the bare right to act under an assumed name. Certainly, in the absence of any other factors or considerations, this right is but a privilege voluntarily conferred by the state, and, therefore, revocable at will. A special power not a common right either of person or of property, but a power entirely artificial and conventional, conferred simply in the execution of a State policy, should certainly remain subject to State control. The power to act under an assumed name thus conferred by the State is not a common right, but is, on the contrary, a special privilege conferred by the state in derogation of the common rights of all other persons and, *a priori*, public policy, as common reason would seem to require, that if the State should subsequently determine the exercise of such right to be contrary

to public policy, that it should be able to withdraw it and thereby dissolve the corporation.

It is, of course, not suggested that a corporate charter may not contain a contract, but what is meant and what would seem too plain for argument, is that the essence of a corporate charter, the bare power conferred by the State upon various individuals to act under an assumed name, is not in itself and cannot be construed into a contract. Many charters, especially charters of quasi public corporations, in addition to creating a corporation, go further and impose upon the resulting corporation special duties, and in consideration thereof grant to it special privileges, which latter may well be said to lie in contract; but what is to be noted is that such a contract, even if found in a charter, is not of its essence but is merely incident thereto. If such a contract be found in the charter creating the corporation, such charter should be to such extent protected from repeal or amendment under the Constitution of the United States; but as is well said by Justice Field, in *Stein v. Mississippi*,<sup>1</sup> in discussing the Dartmouth College case: "In this connection it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain; if there is no contract, there is nothing in the grant upon which the Constitution can act." The erroneous doctrine that all corporate charters, without regard to any especial contract, are protected as contracts under the Constitution of the United States, which doctrine is generally assumed to be established by the Dartmouth College case, is founded partly upon a misconception of the true nature of corporations, and partly upon the failure to distinguish between ancient and modern charters. It is true that the old English charters, like the charter of Dartmouth College, were in form grants, but the reason for this is to be found not in the peculiar character of the corporation or in any contractual relation which the state intended to establish therewith, but in the fact that the old English charters were in their very nature grants, not simply for the purpose of creating artificial persons to conduct commonplace enterprises,

<sup>1</sup> 101 U. S., p. 16.

but were grants of political privileges which the corporators either purchased or wrested from the crown. These charters took the form of grants, not because the corporators had a vested right to act under an assumed name, but because the object and purpose of such charters, of which the creation of the corporation was but an incident, was to protect the members of the corporation, in the exercise of certain privileges, from the tyrannical interference of not the state but the crown.

Historically, corporations were chartered for public or, more properly speaking, political purposes. It is not meant that they were public corporations in the present technical sense of such term, that is mere agencies of the state ; on the contrary, there were few, if any, such. But such charters were primarily grants of political privileges, the corporations existing merely as incident thereto. Naturally, therefore, these charters, being in the nature of charters of liberties, took their solemn form and were vigorously maintained against the encroachments of the crown. But, it is to be remembered, that it was the political privileges and liberties conferred and not the mere right to act under an assumed name that were thus maintained. A glance at the old English corporations will bring this fact out. The first English corporations were probably the guilds. These were associations of tradesmen primarily for mutual advantage, but who, in consideration of certain public duties to be by them performed, had obtained from the crown special political powers and privileges, often of such broad character as to practically embrace the government of a municipality. Historically speaking, indeed, municipalities, as the outgrowth of such guilds, were not as now mere political agents of the state, but were associations of persons who, by charter, had acquired the right, in certain respects, to govern themselves. The charters were, indeed, in many respects, similar to those of the great universities—to that of Dartmouth College ; but it is not to be argued from this that these latter charters were, in any sense, contracts. On the contrary, the only deduction, if any, to be drawn, is that these latter corporations are like municipalities, of a political char-

acter, and, therefore, according to our modern doctrine, subject to state control.

The charter of foreign colonies were of the same character. To encourage the establishment of such a colony, a charter would be granted the adventurers, carrying with it various political rights and privileges. Many of the American colonies were thus established; their charters were in form compacts, and the proprietors and colonists, therefore, properly maintained them to be guarantees of political liberties. Going a step further, charters were then granted to companies of merchants conferring certain trade privileges of a political character. But so far stock companies were unknown; and the members of corporations merely enjoyed the political privileges conferred. In the year 1600, however, the first joint stock company, the East India Company, was chartered by the crown. This charter, also, was in form a compact. In consideration of their undertaking certain annual ventures in the Indies, the corporators and their successors, under the name of the East India Company, were granted certain trade and political privileges. Thus far this charter was similar to others previously granted, but in addition this company was authorized to issue stock and to carry on its enterprise in the corporate name for the benefit of the stockholders. Heretofore the members of corporations had enjoyed their political privileges as individuals, the corporation merely existing for the purpose of protecting and maintaining them, but by this charter, as with modern stock companies, all such privileges were vested in the corporation itself, the members thereof having only the right to elect the governing board and to share the profits.

As the East India Company may be said to usher in the modern stock company, it may be well to stop for a moment to compare the old with the new corporation. Both are artificial persons resulting from the right conferred by the state upon various persons to act under an assumed name, but otherwise there is little or no similarity between them. Their charters are essentially different. As seen, the old charters were charters of privileges and liberties of a more or

less political character, of which the act of incorporation in itself was a mere incident, while modern charters are, as a rule, mere acts of incorporation, their sole purpose and intent being to create artificial persons. Old English charters were considered by the people, although not in law, inviolable by the crown, because they were of a public character and carried with them or guaranteed political privileges and liberties, and not because of any legal doctrine or belief that there was anything in the simple act of creating an artificial person binding upon the state; the present legal doctrine, therefore, of the inviolability of corporate charters can find no support in the old English law or sentiment. On the contrary, the very characteristic of the old corporations, its political character, that protected it from the interference of the crown would, under our present doctrine of public corporations, render like corporations subject to state control. The doctrine of the Dartmouth College case, therefore, that charters, as grants or executed contracts, can be neither repealed or amended by the State, cannot be supported either historically or theoretically. Yet, very possibly, the decision itself was correct. It is to be noted that the legislature of New Hampshire did not undertake to repeal the charter in question, but merely amended it so as to change the administration of the College—a very different thing. And the Supreme Court of New Hampshire, in sustaining such act, based its opinion upon its finding that such College was a public and not a private corporation. But, assuming the Supreme Court of the United States to be correct in its finding that such College was a private corporation, a very different case is presented. The State having granted certain individuals and their successors the right to administer a private fund committed to them for a private purpose, under an assumed name, might have deprived such persons, by the repeal of such act, of such special privilege and thereby remitted them their common law rights and duties; but it does not follow that the State possessed the right to transfer this privilege of administering such private property to certain other persons selected by itself. The question of the public or private character of this College was



a fundamental question upon which the State and the United States courts disagreed; the Supreme Court of New Hampshire sustaining the act in question simply as an exercise of the recognized right of the State to regulate and control public corporations. With this divergence of finding, however, we need not concern ourselves further, except to note the rather curious fact that, if the Supreme Court of the United States had but followed the New Hampshire court in holding an educational corporation to be of a public character (as it probably would have done if the case had arisen within the last few years), it would have been compelled to affirm the State decision, and the unfortunate doctrine of the case would probably never have been established. We say unfortunate, for that such doctrine is unfortunate, is, outside of any *a priori* reasoning upon the subject, established by the fact that every State in the Union has been compelled, as a matter of self-preservation, to override such decision by constitutional or legislative provision.

But let us return to the right of the State to amend, without repealing, the charter of a private corporation. In so far as a corporation charter merely confers upon certain persons the right to exercise certain property rights under an assumed name, what has been said with reference to the right of the State to repeal such act and thereby deprive such persons of every right so conferred, applies as well to the right of the State by the amendment of such act, to limit and restrict such persons in the further exercise of such special rights so conferred, so long as such amendment does not interfere with any vested property right of the corporation itself. For instance, a manufacturing corporation could, by proper amendment of its charter, be deprived of its general power to buy and sell lands, provided such amendment did not in any way affect its right to sell such lands as it might have already acquired or contracted to acquire, as only in such latter case would the corporation, as a continuing existing person, be deprived of a vested property right without due process of law. It may seem strange, at first sight, that such an act, applicable to the property belonging to a corporation, would be invalid if the

corporation continued to exist, and yet an act repealing the entire charter and, therefore, necessarily having the same result, would be valid. The distinction, however, is plain. In the latter case, the land belonging to the dissolved corporation would become immediately the property of the directors, receivers or the stockholders of the corporation, as the case might be, with full power of sale vested in them; while, in the former case, it would still remain the property of the corporation, but with the power of sale divested, and it is in this divesting of the power of sale that the invalidity of the act is found. Likewise an act amending a corporate charter, so as to deprive it absolutely of its right to make contracts, would also be void, since that would be to deprive it, while still an existing person and recognized as such in the law, of a vested right with regard to all property belonging to it; and an amendment regulating the exercise of such contractual rights in certain cases would also be, for the same reason, void, unless it could be sustained as a reasonable exercise of the right of the State to regulate the use of a public franchise. It is on this ground, of course, that acts such as those fixing railway charges are sustained, while, for the general reasons heretofore stated, they are void, if unreasonable, as depriving persons of property without due process of law.

It may be generally stated, therefore, that acts repealing corporate charters are valid, as also all acts to amend such charters by limiting the powers originally conferred thereby, provided such amendments are not applicable to vested property rights. It is often suggested, however, that such acts, either of repeal or of amendment, should be held invalid with reference to stock companies as impairing the obligation of the contract between the stockholders, irrespective of any contract between the State and the corporation or any vested right of the corporation as an existing person. This supposed contract among the stockholders is very commonly referred to by text-writers and jurists as an indisputable fact and one of the chief characteristics of a stock company, but, under the analysis of a corporation here given, there seems to be no place for such a contract.

A corporation is but an artificial person existing as the result of the right conferred by the State upon various persons to act under an assumed name ; the stockholders are but the donors of the corporate property. Where, then, or in what, is the contract among such stockholders ? There may be, and often is, a contract among promoters (who may afterwards become stockholders) with reference to the formation of the corporation, but upon the formation of the corporation such contract ceases. There is, also, often a contract of subscription between the stockholders and the corporation, but upon the full payment for and issue of the stock subscribed for, such contract is fulfilled, or, in any case, and even before so fulfilled, it is a contract between the corporation and its stockholders as individuals and not in any way a contract among the stockholders themselves. A person may become a stockholder of a corporation in two different ways : first, by contract of subscription with the corporation, above referred to, and second, by the purchase of the stock from third persons. In the latter case he evidently enters into no contract with either the corporation or any of the stockholders, but merely a contract or purchase and sale with the former stockholder. In either of the above instances it seems impossible to find a basis for any contract among the stockholders themselves, and in fact none such exists.

The rights and duties of stockholders, indeed, are fixed and determined, but evidently not by any contract among themselves, for they need not have any dealings with each other, but, by law, the fact being that such rights and duties cannot in any way be affected by any contract among themselves. The position of a stockholder in the corporation is evidently one of status and not of contract, and this becomes especially evident when we consider other corporations than those of a commercial character. Take, for instance, the citizens of a municipal corporation, who occupy in many respects a position with regard to the corporation and with regard to each other similar to the position occupied by stockholders. Certainly, it would be absurd even to suggest that any contractual relation exists between such citizens, and yet there is nothing in the

status of a stockholder which serves to distinguish him in this respect from the taxpayer and voter of a municipal corporation. In accepting the charter, or in incorporating the company, the stockholders do, indeed, fix the status of themselves and their successors, but they enter into no contract with each other. They one and all submit themselves necessarily to the law controlling the stockholders of a corporation, but enter into no contract which could be by law impaired, unless it be the contract of subscription with the corporation just referred to and which we will now consider. This subscription contract is based upon the charter. The subscriber to stock agrees thereby to pay the corporation, or, under our definition, the persons authorized to act as such, a certain sum of money to be held and administered by them in their corporate capacity for the corporate purposes as set forth in the charter and, therefore, of course, when such money is paid, it is taken by such corporation or by such persons in such corporate capacity under the resulting contract or trust, as it may be put, that it should be held and used by them in such corporate capacity for such corporate purposes. There, therefore, remains in such stockholders and their successors a vested right in such property to have it managed by such persons and no others, acting in such corporate capacity, applied to such purposes, which vested right, of course, is protected by the various constitutional provisions heretofore referred to.

The State, therefore, cannot, under the guise of amending the charter of a corporation, divert such funds from the charter to other purposes or transfer its administration from the persons to whom, under the original charter, it was committed, to other and different persons, for such an act would both impair the obligation of the implied contract between the corporation and its stockholders, and deprive the stockholders of a vested right in the corporate property without due process of law.

It is interesting to again note here that, assuming Dartmouth College to have been a private corporation, this doctrine sustains the decision of the Supreme Court in such case, since

the statute there in question purported to actually transfer the property of such College from one set of trustees to another.

The only other contracts that might be effected by acts repealing or amending charters are the contracts of the corporations with third persons; plainly, an amendment would be invalid which impaired the obligation of such contract, but a repeal would never impair the obligation thereof, since the dissolution of a corporation as is well determined by the Supreme Court, in *Greenwood v. Union Freight Ry.*,<sup>1</sup> is in the law, but the death of a person and such contracts survive against the corporate successors.

As already suggested, however, a corporate charter is protected from repeal or amendment, to the extent that it contains a special contract or vests property rights. If, for example, a street railway is constructed relying upon the franchise to operate the same upon public highways, granted by the corporate charter, then such franchise is absolutely necessary to the user of such railway property, and in connection therewith should be held a vested property right; or to take the case of a contract, if a railway is constructed relying upon a tax exemption, granted by the charter, then such exemption becomes a contract executed on the part of the railroad and, therefore, binding on the State in the absence of a specially reserved power of amendment or repeal. This power, however, is now almost universally reserved to the State, and, therefore, all charters are now subject to repeal and to such amendment as does not, as heretofore shown, impair any existing contract or divest the corporation of any vested property right.

The status, however, of corporations formed under the general law would seem to be quite different. In such case the State has evidently conferred no special license, in its nature revocable, upon special individuals, but, on the contrary, has granted to all persons alike a general right which it would, therefore, seem it could not abrogate with regard to special individuals. The State, therefore, should not have the power to repeal or amend the charter of such a corporation by a special law,

<sup>1</sup> 105 U. S. 13.

since that would be to deprive the persons constituting such a corporation of a right common to all other citizens. Of course, however, such corporations are not beyond the control of the State, but, being formed under general laws, they should be reached by amendments thereof or by other general laws applicable to all corporations of their class. What has been heretofore said with reference to the amendments of special charters by special laws applies equally to the amendment of the charters of such corporations by general law, and any such general law which impairs the obligation of existing contracts or deprives any corporation of a vested property right will be invalid, although, as heretofore shown, a general law dissolving such corporations would be perfectly legal.

*Henry Winslow Williams.*

Baltimore, October, 1898.

(To be concluded.)

"NO ONE SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF,"

CONSIDERED WITH SPECIAL REFERENCE TO THE UNCONSTITUTIONALITY OF STATUTES OF IMMUNITY OR INDEMNITY.

Throughout the centuries of civilization there has been a great problem confronting the most distinguished writers and jurists of all nations. The foremost thought of the times has endeavored to solve this problem either by the principles of logic or by the instinctive feelings of humanity. The diverse views on this problem have all been predicated on the ultimate principle of elevating humanity to a higher and nobler plane. Reasons *pro* and *con* almost innumerable have been advanced on either side and, to the minds of the reasoners, the conclusion reached has been proved beyond a question. This great problem has been, and is nothing more nor less than, how shall the truth be best established in a suit at law with the least harm to the individual and the greatest good to society? This problem embodies the whole law of evidence, not only as we of the common law understand it, but those as well of the civil law and of the canon law.

The law of evidence involves as many and perhaps more intricate points in all systems of jurisprudence than any other branch, unless it be that of pleading. Many of these questions were settled years ago, and have remained ever since unchanged. Others have not been and are not yet settled. They remain still a bone of contention among lawyers and philosophers, and frequently are a matter which leads the populace (who are told that "ignorance of the law excuses no one") to believe that these abstruse discussions are more for the purpose of bewildering their minds than of arriving at any real and substantial conclusion. About the question we have selected such conditions exist. Old principles long considered estab-

lished have been broken in upon by legislation until we are all at sea, lawyers as well as laymen. A return to fundamental principles will be necessary to get our bearings.

It was the custom and law of Rome, that no one except a slave should be compelled to give testimony against himself. One of Cicero's most noted invectives is the one against Verras, who attempted by torture to compel a Roman citizen to testify. Aulus Gellius, Tully and Ulpian characterize the methods practiced upon slaves not only as cruel and inhuman, but as producing falsehood rather than truth.

These Roman writers and speakers tell us that men in their extremity will not hesitate to testify to an untruth; that to compel pain of body and mind in order to secure the truth is against the very law of nature. The law writers and causuists of the Middle Ages endeavored to show that such was not the case, and though some admit the rule was harsh, justice demanded its strict application to all persons. It was reasoned that, for very tenderness, the law could not endure that any man should die upon the evidence of false or even a single witness, and that, therefore, this method was contrived whereby innocence should manifest itself by stout denial or guilt by plain confession. There were those who had the courage to make a protest, even at a time in which to invent some new engine of torture was to receive the plaudits of the populace and the rewards of the government. Beccaria, Ch. 16, with the satire of mathematical precision, thus characterizes the methods then in vogue: "The force of the muscles and sensibilities of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess guilt of a given crime." Disregarding all protests under the Roman law, to comparatively modern times under the civil law men have been compelled by the most awful tortures to give testimony in "any criminal case."

In the trial of Prince Pierre Bonaparte<sup>1</sup> we have an example of the inquisitorial proceedings of the continent. Indeed, within a year the civilized world has been shocked and its sense of justice outraged by the proceedings in the trial of

<sup>1</sup> AM. LAW REV., Vol. V, p. 14.



M. Zola at Paris, and especially has this been so with the people of the United States, on account of the *incommunicado* to which men were subjected who ran afoul of Spanish justice.

It is an ancient principle of the law of evidence, as it was administered by our ancestors, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or make him subject to fines, penalties or forfeitures. Neither Fleta, Glanville nor Bracton make any mention of the right inherent, in every man born under the common law, to demand that he shall not be compelled, in any proceeding, to give testimony which may incriminate him. This does not argue that the right did not exist. So great has always been the respect paid to individual freedom among the Anglo-Saxon people, that from the very earliest times this right has been fundamental in their system of legal procedure and almost axiomatic.

The Norman had not set his foot on English soil many years before the moderation of the common law became an intolerable check to his rapacity. By the statute of 3 Edw. I, c. 12, the dreadful punishment of *peine forte et dure* was introduced. This was contrived to compel an accused person to testify, when, rather than plead, he would stand mute. Previous to this time, in such a case, the accused was tried by two juries; and, if found guilty by both, it was decreed he should be punished according to the charge. Blackstone tells us<sup>1</sup> that "if the corruption of blood and consequent escheat in felony had been removed, the judgment of *peine forte et dure* might, perhaps, have innocently remained as a monument to the savage rapacity with which the lordly tyrants of feudalism hunted after escheats and forfeitures."

That Blackstone was mistaken, we have ample proof. In America, where escheats never prevailed, there was a case—poor Giles Corey, when accused of witchcraft, was pressed to death for refusing to plead.<sup>2</sup> In England the punishment of *peine forte et dure* was abolished by 12 George III, c. 20, and

<sup>1</sup> Bk. 4, 328.

<sup>2</sup> 3 Bancroft His. 93.

the same punishment allowed for refusing to plead as in case of conviction on the charge. Under this statute, in 1777 at the old Baily, and in 1792 at Wells, men were hung for refusing to plead on arraignment.

It is a fact of history, too clearly evidenced to be doubted, that the rack was commonly used as an engine of state during the reigns of the Plantagenets and the Tudors. Woe to the man who fell under the displeasure of the Richards, John, or the later Henrys. Men were ruthlessly thrown into dungeons to die in awful agony, or were put upon the rack to force from them a confession which would implicate fellow-conspirators; but this was never the law of England. It was an usurpation of the law in the hands of a sovereign who overrode the law and trampled solemn charters under foot. The rack was never even proposed as an instrument of the law but once. This was in the trial of Felton, during the reign of Elizabeth, when Bishop Laud, of London, proposed the use of the rack upon the accused to discover his accomplices in the assassination of the Duke of Buckingham. The matter being referred to the judges, it was unanimously agreed that, "to the honor of the law and to the honor of the judges, the rack could not be legally used."<sup>1</sup>

There is a great deal of evidence to show that the common law principle always was that no one should be compelled to incriminate himself. Coke says of Leigh's case, in 10 Eliz.: "As to Leigh's case remembered this mere recited, for it was 10 Eliz., Dyer, but not in the printed book, but in his other book, a manuscript written with his own hand, which book I have, in which are many cases not in the printed book . . . This Leigh was an attorney of the C. B. (He loved masses as well as he did his life.) Thither he went, and would go to hear this. And touching this matter the Ecclesiastical Judges would have examined him on oath. He refused to answer them. Upon this they committed him to the Fleet. The judges did then presently send for their attorney by *habeas corpus*, and upon return they did, in this case, examine the matter and said *quod nemo tenetur seipsum prodere*; and so for this cause

<sup>1</sup> Trial of Felton, 3 State Tr. 368-371.

they delivered him. (The sheriff would be always ready to take him by the back if he once consents the matter against himself.)" A similar decision is recorded in Hinde's case for usury,<sup>1</sup> also Burrows and other plaintiffs, for not taking an oath.<sup>2</sup> It will be seen that these cases record the most ancient decisions of which there is any record, and some of which were merely remembered. Though not actually going back to the time when "the memory of man runneth not to the contrary"—the beginning of the reign of Richard, 1189—still they do reach back to a time when the contrary was neither known nor remembered. The most important among many modern English cases affirming this ancient rule are the following: *Sir John Friend*;<sup>3</sup> *Earl of Macclesfield*;<sup>4</sup> *Rex v. Slaney*;<sup>5</sup> *Cates v. Hardacre*.<sup>6</sup> Such we find the common law to be as administered by the judges of the English courts.

The English Government had not learned that Englishmen were entitled to all the rights accorded them by the common law, wherever they might be under the jurisdiction of the crown, until it was too late, and the King had lost his most valuable colony. The pioneer settlers had seen the rights and privileges they held most dear to personal freedom and liberty entirely disregarded as to themselves. They also remembered how they or their immediate ancestors had been compelled to leave their fatherland because of prosecutions never recognized by the laws of England. Many of these people were from Continental Europe, and knew by bitter experience the unlimited rapacity and savagery of the ruling classes. They had fled from the ruling classes, that they might have civil and religious liberty. When the minute men fought at Lexington, suffered at Valley Forge, and finally stood in line of attack at Yorktown, it was for the maintenance of the ancient and inalienable rights of Englishmen. For eight years the colonists, irrespective of nationality,

<sup>1</sup> 18 Eliz.

<sup>2</sup> 13 Jac. 1, 3 Bulstrode, 50.

<sup>3</sup> 13 How. St. Tr. 16.

<sup>4</sup> 16 How. St. Tr. 767.

<sup>5</sup> 5 Car. P. 213.

<sup>6</sup> 3 Taunt. 424.

stoutly maintained their rights against a tyrannical government. It is little wondered, then, that we find the colonists, irrespective of previous nationality, firmly united in defence of the ancient principles of common law.

The freedom of the colonies once secure, the people set about also to secure the liberty which had been the ultimate object of the Revolution. A constitution was drawn, defining the powers of the states and general government, and providing for the administration of the new state of affairs. No mention was made in it of the particular liberties contended for. It contained no bill of rights on which the people could confidently rely. This was one of the strongest arguments against the Constitution.<sup>1</sup> Finally the Constitution was adopted, with the express understanding that a bill of rights would also be proposed for adoption.<sup>2</sup> This was done at the very first session of Congress, and ten of the proposed amendments received the ratification of the states in a short time and became incorporated into the Constitution. We find that four of these had to do with the rights of the people when a criminal accusation was brought against a man, or any of his acts were brought to light upon which a criminal case could be founded.<sup>3</sup> The third clause of the fifth amendment declares that "No person . . . shall be compelled, in any criminal case, to be a witness against himself." The scope and effect of this clause will be the subject of the subsequent discussion.

That no person shall be compelled to give evidence against himself in any criminal case is but an affirmance of a common law privilege of inestimable value.<sup>4</sup> This is a fact of common knowledge, and is affirmed, without exception, in the constitutions of all the states as well as of the United States. It is stated in somewhat different words in the various places. Being an affirmance of a broad privilege accorded by the common law, the rule of construction must be co-extensive

<sup>1</sup> Federalist, 83, 84; Vol. 2 and 3, Elliot's Debates.

<sup>2</sup> Choate, Lec. on Jefferson, Burr and Hamilton, 1858.

<sup>3</sup> Story, Const. Sec. 301 and note; Const. Amend. 4, 5, 6, 8.

<sup>4</sup> Story, Const. Sec. 1788.

with the manifest purpose, and, as far as possible, all given the same interpretation.<sup>1</sup>

The question naturally arises, what is the interpretation to be given this clause, or, in other words, what is the common law on this subject?

For a long period it was undetermined whether or not the common law privileges extended to protect the witness against the disclosure of facts, which would subject him to a mere civil action. Cases were to be found in the *nisi prius* courts on either side of the controversy, varying as the equities of the case seemed best to suggest. In 1806 the question arose upon the impeachment of Lord Melville, and, upon being referred to the Law Lords, it was ruled that the witness must answer, though it did subject him to civil action. The question was, however, left in some doubt by a strong dissenting opinion from four of the judges, including Lord Mansfield. It was later settled in conformity with the opinion of the majority of the judges by 46 Geo. III, c. 37. In the United States the great weight of authority is now in conformity with the rule as settled by statute in England.<sup>2</sup>

Whether a witness will be compelled to answer a question which will disgrace him, has been decided in the negative in two very early cases in the history of American Law, and one late case in the District Court of the United States for the Northern District of Illinois.<sup>3</sup> It may be said of these rulings, with all due respect to the eminent and honorable judge who decided the late case, that the true rule, as supported by the great weight of authority, and, to our mind, the sound reason of justice and public policy, is: "That where the transaction to which the witness is interrogated *forms any part of the issue* to be tried, the witness will be obliged to give evidence, how-

<sup>1</sup> Counselman v. Hitchcock, 142 U. S. 547.

<sup>2</sup> Robinson v. Neal, 3 T. B. Mon. (Ky.) 213; Stoddert v. Manning, 2 Har. & G. (Md.) 147; Alexander v. Knox, 7 Ala. 503; Nass v. Vanswearingen, 7 S. & R. (Pa.) 192; Steward v. Turner, 3 Edw. Ch. (N. Y.) 458; Planter's Bank v. George, 6 Mar. (La.) 670, overruling Orleans Nav. Co. v. New Orleans, 1 Mar. (La.) 23.

<sup>3</sup> Com. v. Gibbes, 3 Yeates (Pa.), 429 (1802); Galbreath v. Eichelberger, 3 Id. 515 (1803); U. S. v. James, 60 Fed. 257.

ever strongly it may reflect on his character."<sup>1</sup> A different rule might deprive parties of the most necessary and urgent testimony for defence against a criminal accusation, penalty or forfeiture, and thus subject an accused to the very same disgrace, which it was designed to ward off from the witness called to give testimony. The good accomplished in *such a case* would be co-extensive with the harm it was designed to obviate. But if the party called as a witness cannot be made to suffer pains and penalties in regard to anything to which he may testify by reason of the Statute of Limitations, a pardon, an acquittal or conviction, then the rule as announced in *The United States v. James, supra*, does not accomplish good co-extensive with the harm. Pains and penalties and the consequent disgrace attached must always, *in foro conscientiae*, be regarded as a greater evil than mere disgrace. Judge Grosscup himself says, in the James case, *supra*: "Happily the day when this immunity (from disgrace) is needed seems to be over. It is difficult for us, who live in a time when there are few, if any, definitions of crime that do not meet with the approval of universal intelligence and conscience, to appreciate these conceptions of our fathers." We can see no reason, therefore, for applying the rule now, which, it has been shown, is against the great weight of authority. If the reason for a rule never general has become obsolete by the changes in the composition of society—as Judge Grosscup admits society has changed—then the old maxim will apply: "*Cessante ratione, cessat lex.*"

But when the evidence asked for goes further than to subject the witness to a civil action or tends to disgrace him, and opens the way for prosecution in a criminal case, the authorities are unanimous in holding that, under the common law and also under the constitutional declaration of the common law, the witness cannot be compelled to testify. The authori-

<sup>1</sup> Greenleaf Ev., Sec. 454; Phil. & Am. Ev., 917; Jennings v. Prentice, 39 Mich. 421; Moline Wagon Co. v. Preston, 35 Ill. App. 358; Weldon v. Burtch, 12 Ill. 374; Clementine v. State, 14 Mo. 112; People v. Mather, 4 Wend. 250; Hill v. State, 4 Ind. 112; King v. Edwards, 4 T. R. 440; Lohman v. People, 1 Comstock, 385; Roberts v. Allpratt, 22 Eng. Com. L. 288.

ties are so numerous and general on this point that it is considered unnecessary to refer to them here. A collection of a large number of cases will be found in 29 Am. & Eng. Ency. of L. 835.

To what extent does this rule go? How may a witness know when he can claim his privilege? This can be answered in no better way than in the words of Chief Justice Marshall, at the trial of Aaron Burr.<sup>1</sup>

This case has been followed in the United States in all its branches except, perhaps, where the Chief Justice says: "And if he say on oath he cannot answer without accusing himself, he cannot be compelled to answer." Some courts have held that they are not bound by the witness' sworn statement unless reasonable grounds be made to appear that the testimony asked for would tend to incriminate him.<sup>2</sup> This we believe to be the true rule, as gathered from the whole of Chief Justice Marshall's argument in the Burr case. If the witness should be able to escape testifying by a sworn statement that what he would say would tend to incriminate him, an obdurate witness would have it within his power to refuse testimony on a mere pretence. But yet the court ought and will allow the witness great latitude in judging for himself;<sup>3</sup> for if he pointed out the direct reason, the privilege would be worthless.<sup>4</sup> The relation of the witness to the subject of inquiry and character and scope of the question must all be considered.<sup>5</sup> In this case it was held a student need not explain in what department of a university he was studying when the subject of inquiry was the death of a waiter at

<sup>1</sup> 1 Burr's Trial, 244.

<sup>2</sup> *Regina v. Garbett*, 1 Den. Cir. Ct. 236; *Reg. v. Boyes*, 1 Best and Smith, 311; *Com. v. Braynard*, Thach. Cir. Ct. (Mass.) 146; *Mahaukee v. Cleland*, 76 Ia. 401; *State v. Lonsdale*, 48 Wis. 348; *State v. Thaden*, 43 Minn. 253.

<sup>3</sup> *Stevens v. State*, 50 Kan. 712; *People v. Forbes*, 143 N. Y. 219; *Jarvin v. Scammon*, 29 N. H. 280; *Chamberlain v. Wilson*, 12 Vt. 491; *Taylor Ev.*, Sec. 1548.

<sup>4</sup> *People v. Mather*, 4 Wend. 229; *Murluzzi v. Gleason*, 59 Md. 214; *Southard v. Rexford*, 6 Com. 254; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; *Burr's Trial*, *supra*.

<sup>5</sup> *Taylor v. Forbes*, Justice, 143 N. Y. 119.



a class banquet from the effect of poisonous gases introduced into the banquet hall by a tube from a room below.

It will be seen that the protection thrown around the witness is complete in every particular. He may not be compelled even to furnish a single link upon which a criminal prosecution can be grounded; and it has been held that this protection is extended to other cases than those where a person is called as a witness in a case being tried in court.

In *Counselman v. Hitchcock*<sup>1</sup> it was held that the witness could not be compelled to incriminate himself when called as a witness before a grand jury investigation. It has also been held that the same rule applies to an investigation by a legislative committee.<sup>2</sup> Both these cases have been decided since the New York cases,<sup>3</sup> in which we have the narrow construction, and we conceive that they lay down the true rule. In *Taylor v. Forbes, Justice*,<sup>4</sup> decided since the *Counselman* case, *supra*, the rule as laid down in the *Counselman* case is approved as authority. It may be inferred that, since the rule applies to the above cases, the protection afforded a witness extends to any kind of an investigation wherein the party called to give testimony may be compelled to do so, if he does not thereby incriminate himself.

The delivery of Blackstone's Commentaries on the laws of England, as lectures at Oxford University, was listened to by a young man, who was afterwards to become famous as his early instructor's chief opponent. This was Jeremy Bentham, the soul of whose life was reform. Reform in law and legal procedure, such as penal laws, laws of property, prison management, all came under his comprehensive sway. Blackstone was attacked by him in scathing terms. He did not believe with the great commentator that the laws of England were perfect as they stood. A large majority of the reforms accomplished during the present century along the lines just mentioned, have been the direct result of the plan laid down

<sup>1</sup> 142 U. S., 547.

<sup>2</sup> *Emery's Case*, 107 Mass. 172.

<sup>3</sup> *People v. Kelly*, 24 N. Y. 74; *People v. Sharp*, 107 N. Y. 427.

<sup>4</sup> 143 N. Y. 219.



by this great student. His best known and most elaborate work is on evidence. In it he inveighed against the many artificial restrictions put upon witnesses by the common law, such as the rules of exclusion disqualifying a wife or husband as a witness against the other, the requirements of religious belief in a witness, the rule prohibiting a person from testifying for himself, the rule granting the privilege to a witness not to incriminate himself, and many others of a similar nature.<sup>1</sup> To his influence may be attributed the abolishment of the rule which "protects any witness from answers which would tend to incriminate him" in India, though still retained in England.<sup>2</sup>

The rule we are discussing has been changed in some respects in England by taking away the privilege in some cases, and giving indemnity in others.<sup>3</sup> The United States, as well as many of the states, has endeavored to give indemnity to witnesses who shall testify to facts which will tend to incriminate them. We believe none of the states have ever passed a general statute in this particular, they having confined the scope of their legislation to particular cases. The United States, however, endeavored to pass a general statute giving indemnity in all cases where a witness was called in its courts or had been called in any foreign court. Indemnity statutes are necessary in this country because of our general constitutional provisions granting the privilege to a witness of refusing to testify against himself. A statute compelling a witness to testify would clearly be unconstitutional.

In England, where the legislative power is supreme, there are no restrictions. Parliament with the Queen is sovereign. It may take away the privilege under discussion in particular cases, or in all cases, or grant immunity or indemnity in some or all, as it is deemed best for the enforcement of law, preservation of order and upbuilding of society. Chief Justice Coke says<sup>4</sup> that "It [parliament] has sovereign and uncontrolled authority in the making, conferring, enlarging, restraining,

<sup>1</sup> Wilson, *Modern English Law*, 254, *et seq.*

<sup>2</sup> Wilson, *Modern English Law*, 256.

<sup>3</sup> See 2 Taylor *Ev.*, par. 1455, for a list of such statutes.

<sup>4</sup> 3 *Inst.* 36.

abrogating, repealing, reviving and expounding of laws concerning matter of all possible denominations, ecclesiastical or temporal, civil, maritime or criminal." Sir Matthew Hale says of it in his work, "Of Parliament," page 79: "This being the highest and greatest court over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should fall upon them, the subjects of this government are left without all manner of remedy."

In some of the states where the statutes of indemnity have been called in question, and also in the United States, the courts of last resort have held them unconstitutional, because they were not broad enough to guarantee to the accused party the full and complete immunity which was necessary under the constitution; in other words, that "in view of the constitutional provision a statutory enactment (of this character) to be valid must afford absolute immunity against future prosecution for the offence to which the question relates."<sup>1</sup> In other states the same principle has been enunciated, but it has been there held that the statute was constitutional, because it granted "absolute immunity."<sup>2</sup> Without stating the above principle there have been a great many cases holding such statutes constitutional, because the statutes were as broad as the evil they were intended to remedy.<sup>3</sup> The reason advanced in some of the decisions holding such statutes constitutional is that the provision of the state constitution in question is not so broad as that of other states in which a like statute has been held unconstitutional. No mention of this reason is made, however, in the New York cases in which "any criminal case" is construed so narrowly. Since the Counselman case, *supra*, holding that the intent of all the con-

<sup>1</sup> Counselman *v.* Hitchcock, 142 U. S. 547; Emery's Case, 107 Mass. 172; Cullen *v.* Commonwealth, 24 Grat. 624; Temple *v.* Commonwealth, 75 Va. 892. See, also, Boyd *v.* U. S., 116 U. S. 616.

<sup>2</sup> State *v.* Nowell, 58 N. H. 314; La Fontaine *v.* Southern Underwriters' Ass'n, 83 N. C. 132.

<sup>3</sup> Quarles *v.* State, 13 Ark. 307; Higdon *v.* Head, 14 Geo. 255; Wilkins *v.* Malone, 14 Ind. 153; People *v.* Kelly, 24 N. Y. 74; People *v.* Sharp, 107 N. Y. 427; *Ex parte* Buskett, 106 Mo. 602; Bedgood *v.* State, 115 Ind. 275; Kain *v.* State, 16 Tex. App. 282; Hirsch *v.* State, 8 Baxt. (Tenn.) 89.

stitutions is practically the same, that contention is hardly tenable.

Immediately after the decision in the Counselman case, Congress passed a statute believed to satisfy all the requirements of that case. After the statute states that no one shall be excused from testifying or producing books and papers before the Interstate Commerce Commission, on the ground that such evidence would tend to incriminate the witness, it says: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, produce evidence, documentary or otherwise, before said commission or in obedience to its subpoena or the subpoena of either of them or in any such case or proceeding."<sup>1</sup> Undoubtedly, the author of the statute believed he had removed the last obstacle in the way of the Interstate Commerce Commission in securing evidence of the illegal practices of the railroads, on which to found an indictment against the officials. This statute was, however, declared unconstitutional by Judge Grosscup,<sup>2</sup> but was upheld by a later case.<sup>3</sup> Although we believe the James case was rightly decided, we cannot concur in the reasons advanced therefor, except, perhaps, the first one, that a right given by the constitution cannot be taken away by statute. The second ground that to answer the question asked would tend to disgrace the witness has previously been shown by the great weight of authority to be erroneous; the further reason that the statute amounts to a pardon and that an accused need not plead a pardon unless he desires so to do, is untenable on the authority of the case cited to support the contention, *United States v. Wilson*.<sup>4</sup> In that case Chief Justice Marshall does hold an accused need not plead a pardon from the President unless he sees fit. Of such a pardon the *court could not take judicial notice*, but if it had been such a pardon that the court must notice it, then it would have been effective

<sup>1</sup> 27 Stat. L. 443, ch. 83.

<sup>2</sup> *James v. U. S.*, 60 Fed. 257.

<sup>3</sup> *Brown v. Walker*, 161 U. S. 591, four judges dissenting.

<sup>4</sup> 7 Peters, 150.

without being pleaded.<sup>1</sup> In the James case, *supra*, the statute relied on was a Federal statute, one of which the court must take judicial notice. The accused was not compelled to plead it. As to the first reason advanced in the James case, I said "perhaps" it was meritorious. In *Kendrick v. Commonwealth*<sup>2</sup> there is a strong opinion by Lacey and Richardson, J.J., dissenting on the same ground advanced by Judge Grosscup in the James case, *supra*. They hold it is not competent for the legislature to take away a right granted by the constitution through an act of immunity because thereby the constitution is annulled by the legislative power. This opinion has more force when coupled with the dissent of Nicholson, C. J. and Turner, J., in *Hirsch v. State*.<sup>3</sup> It states that "We hold the law does not abrogate the offence until the witness has testified, but that after the witness has testified the law then virtually operates to abrogate it and shield him from prosecution. The act of testifying constitutes the abrogation of the offence under the law. This only occurs after the witness has voluntarily waived his constitutional right to refuse to testify. If he does not voluntarily waive his right he cannot be deprived of it by compulsory law." This is a logical and just conclusion. It does not infringe the personal privilege of the accused as given him by the constitution. He may testify or not as he sees fit, but once having voluntarily given testimony, which would tend to incriminate him, the statute acts as a pardon and he may not thereafter be prosecuted for anything upon which he may give evidence. It is a statutory way of making effective a prosecuting attorney's promise to refrain from prosecution in return for state's evidence. Otherwise the agreement so frequently made by states' attorneys to secure this kind of evidence has no force whatever. Neither the court nor prosecuting attorney can offer a witness such indemnity. It must be guaranteed to him positively by statute.<sup>4</sup>

<sup>1</sup> See, also, 4 Black Com. 402.

<sup>2</sup> 78 Va. 490.

<sup>3</sup> 8 Baxt. (Tenn.) 89.

<sup>4</sup> *Temple v. Commonwealth*, 78 Va. 819.

We rest our conclusions on a different basis and one which we believe has never, except in one case, been advanced by any of the courts as a reason for their decisions concerning the constitutionality of these statutes. Perhaps this is for the reason that, except in *Brown v. Walker, supra*, the exact point has never arisen in any of the cases in the states, and other sufficient grounds have always been found in the Supreme Court of the United States. We believe the true rule is, that a statute of the kind in question must give "absolute immunity" to the unwilling witness, as shown heretofore, and that the dissenting judges in *Brown v. Walker, supra*, took the right position in their dissenting opinion.

There are offences which are not only a transgression of the laws of one jurisdiction, but also of another jurisdiction, and so far as *that act* is concerned, these jurisdictions may be entirely independent. Or a person may be called to testify in a case, not necessarily criminal in its nature, which will involve facts tending to incriminate the witness in another jurisdiction over which the court or legislature in which the witness is called has no authority.

We do not propose to enter into an extended discussion of the police powers of the states nor of the extent of the power granted by the states to the Federal Government. It is only necessary to show that a state of facts may arise which would lead to the conditions just mentioned and we have substantiated our contention.

Whether the states emerged from the control of the crown, and stood out after the troublesome times of the revolution as independent sovereignties, has been a question involving almost every manner of speculative discussion. It is true that they have never been recognized as such except, possibly, when, for a short time, Rhode Island and North Carolina had the liberty to assume complete powers of sovereignty. They undoubtedly had this power, and though it was never assumed, the first remained outside the Union for over a year, and the latter about six months.<sup>1</sup> It is said by Chief Justice Jay: "From the crown of Great Britain the sovereignty of their country

<sup>1</sup> Cooley, Con. Limit., pp. 8, 9; Story, Sec. 271-280.

passed to the people of it; and it was not then an uncommon opinion that the unappropriated lands, which belonged to the crown, passed not to the state within whose limits it was situated, but to the whole people. On whatever principle this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and consideration."<sup>1</sup> Before the adoption of the Constitution, the states had all the attributes of sovereignties.<sup>2</sup> But emerging from the principles of the Revolution, which were very ill defined, the states at once in the "warmth of mutual affection" looked to each other for a continuation of the support given in a time of great need, and the moral obligation bound them together in a new compact.<sup>3</sup> This compact is said by Van Buren<sup>4</sup> to have been an heroic though, perhaps, a lawless act. Yet it is declared by Chief Justice Chase, in *Texas v. White*,<sup>5</sup> when discussing the status of the states which seceded during the Civil War, that he can conceive of nothing more nearly a unity than a "perpetual union" made "more perfect." Notwithstanding these divergent opinions they will help us to understand more clearly the respective powers of the state and Federal Government.

It is declared by the tenth amendment to the Constitution that, "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." Although "the people" are in some parts of the Constitution interpreted to mean the whole people of the United States, collectively represented, as "We, the people," in the preamble of the Constitution, in this amendment it was never so intended. Citizenship of a state and citizenship of the United States are entirely separate and distinct.<sup>6</sup> "The Government of the United States can claim no powers which are not granted to it by the Con-

<sup>1</sup> *Chisholm v. Georgia*, 2 Dal. 470.

<sup>2</sup> *License Cases*, 5 Howard, 587.

<sup>3</sup> *Federalist*, No. 53, by Madison.

<sup>4</sup> *Pol. Par.* 50.

<sup>5</sup> 7 Wal. 724.

<sup>6</sup> *Slaughter House Cases*, 16 Wall. 36.

stitution; and the powers actually granted must be such as are expressly given or given by necessary implications."<sup>1</sup> "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament except where they are restrained by a written constitution. This must be conceded, I think, to be a fundamental principle in the political organization of the American states. We cannot comprehend how upon principle it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular state in question."<sup>2</sup> The principle upon which the judges have gone is aptly stated by Chief Justice Marshall in *Gibbons v. Ogden, supra*: "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which effect the states generally; but not to those which are completely within a particular state which do not effect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." Thus there grows out of the theory of our government a complicated system of sovereignties, each exercising exclusive jurisdiction within its own sphere, but both over the same territory.<sup>3</sup>

If the general government is supreme in its sphere, it follows that any statute passed by it in conformity with its powers must be given precedence over any state law or constitution which conflicts with it.<sup>4</sup> The last case cited is authority on

<sup>1</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 326; *Gibbons v. Ogden*, 9 Id. 187; *Calder v. Bull*, 3 Dal. 386; *Gilman v. Philadelphia*, 3 Wal. 713; *Weister v. Hade*, 52 Pa. 477; *Briscoe v. Bank of Kentucky*, 11 Peters, 316.

<sup>2</sup> *Thorpe v. Rut. & Bur. R. R. Co.* 27 Vt. 142; *Mason v. Waite*, 4 Scam. (Ill.) 134; *Sears v. Cottrell*, 5 Mich. 251; *Legget v. Hunter*, 19 N. Y. 445.

<sup>3</sup> *Cooley, Const. Lmt.* p. 2.

<sup>4</sup> *Marbury v. Madison*, 1 Cranch, 137; *Sturges v. Crowninschield*, 4 Wheaton, 122; *Ex parte Eames*, 2 Story, C. C. 332.



the exclusive jurisdiction of the Federal courts within their sphere. Perhaps, however, the strongest case on that subject is that of *Abelman v. Booth*.<sup>1</sup> In that case Booth was held by United States Marshal Abelman for violating the fugitive slave law. The State Court of Wisconsin issued a writ of *habeas corpus*, and the Supreme Court of the state held that the writ would lie on the ground that the Federal statute under which the prisoner was arrested was unconstitutional. The State Court even went so far as to order the clerk to make no return on the writ of error or to enter any order upon the journals or records of the court concerning the same. This power was expressly declared on appeal to the Supreme Court of the United States not to be within the sphere of the State Court. It was said by Chief Justice Taney: "When a court, so elevated in its position, has pronounced a judgment which, if it could be maintained, would subvert the very foundation of our government, it seemed to be the duty of this court . . . to show plainly the grave error into which the State Court has fallen."<sup>2</sup>

The general government is supreme, however, in its sphere only. Its power is circumscribed by the Constitution, and any act, legislative or judicial, outside this sphere, is void. There the states are supreme. In the forty-fifth number of the *Federalist* it is said: "The powers of the states would extend to all objects, which, in the ordinary course of affairs, concerns the lives, liberties and properties of the people, and internal order, improvement and prosperity of the state."<sup>3</sup> The states exercise full and complete power over everything connected with the social and internal condition, which relates to moral and political welfare.<sup>4</sup> Every law for the restraint or punishment of crime, or the preservation of public peace, must come within the power of the states.<sup>5</sup> A writ of *habeas corpus* was taken out for a man drafted into the military service of the

<sup>1</sup> 21 How. 506.

<sup>2</sup> See, also, *Tarbel's Case*, 13 Wal. 397; *In re Spangler*, 11 Mich. 299.

<sup>3</sup> *Mayor of New York v. Milne*, 11 Peters, 132; *Calder v. Bull*, 3 Dallas, 386.

<sup>4</sup> *License Cases*, 5 How. 588.

<sup>5</sup> *License Cases*, 5 How. 631.



United States in Michigan. The judge said in deciding the case adversely to the writ: "The Federal Government and state government exist as independently as the government of the several states; each acting within its sphere is foreign to the other and independent, and this principle extends to the courts of each. . . . We have two governments, a state government and a Federal government; each of these is supreme within its sphere. . . . Neither is supreme in the sense that it has power to dictate or control the other when acting within its appropriate sphere. Each is supreme in its own sphere. Neither is supreme within the sphere of the other."<sup>1</sup> "The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other, within their respective spheres, and the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or state court as if the line of division was traced by land marks and monuments visible to the eye. The Federal and state governments are supreme in their respective sphere; first, in delegated powers; second, those not delegated, and any act beyond of either is null and void."<sup>2</sup>

Perhaps at this point, if not before, the reader has come, as we have, to believe with the judges of the Supreme Court of Indiana: "First, the states are to exist with independent powers within their sphere. Second, the Federal Government is to exist with independent powers within its sphere." This doctrine, which has pervaded our whole system of government, seems, however, to be fast losing ground, and in a late decision of the Supreme Court of the United States<sup>3</sup> to have been entirely overthrown. Were it not that the opinion of itself, by a bare majority of the court, states that the ground taken was hardly necessary to the proper decision of the case, and also that four judges make a vigorous dissent, the conception

<sup>1</sup> *In re Spangler*, 11 Mich. 299.

<sup>2</sup> *License Cases*, 5 How. 588.

<sup>3</sup> *Brown v. Walker*, *supra*.

of "State Sovereignty and National Unity" would be a thing only to be remembered.

In respect to some transgressions, it sometimes occurs that not only the provisions of the law of the United States are violated, but also the same act is a violation of the statute of the state. One fact or series of facts may constitute two crimes, each of which is an offence against separate and independent jurisdictions, so far as these facts are concerned, and a prosecution in one will be no bar in the other. Thus, nearly all the states provide a penalty for the offence of counterfeiting. This is also punishable by an act of Congress. Likewise with the offence of assaulting a United States marshal or hindering him in the execution of a process. So, also, where larceny is committed in one state and the goods taken into another. The person may commit two crimes punishable in two jurisdictions, which, if both were within one jurisdiction, and prosecution were attempted for both in different places or in the same place at different times, a conviction for one can be pleaded in bar to the other.<sup>1</sup>

Since the control of railroads in the matter of unjust discriminations has come to be a common subject of legislative action, both state and national, providing penalties for non-performance of certain duties relative thereto, it will no doubt be a subject soon coming before the courts for adjudication, in both state and Federal jurisdiction. As interstate and intrastate commerce are so closely related, an investigation in either jurisdiction is not only liable but most likely to involve facts tending to incriminate a witness in the other.

Section No. 860 of Revised Statutes of the United States was a general statute of immunity, or proposed such. It was declared unconstitutional in *Counselman v. Hitchcock*, *supra*, as not broad enough to give absolute immunity even in the Federal courts. This statute proposes to give immunity

<sup>1</sup> *Fox v. Ohio*, 5 How. 410; *Prigg v. Pa.*, 16 Peters, 540; *City of N. Y. v. Milne*, 11 Peters, 142; *Barron v. Baltimore*, 7 Peters, 243; *Houston v. Moore*, 5 Wheaton, 1; *White v. Commonwealth*, 4 Bin. 418; *Stearns v. United States*, 2 Paine C. C. 300; *U. S. v. Holloday*, 3 Wal. 407; *Moore v. State of Ill.*, 14 How, 13.

for any "pleading, discovery or evidence obtained from a party or witness by means of any judicial proceeding in this or any foreign country." It was the intention of the legislators that evidence might be demanded, when necessary, of a character tending to incriminate in any proceeding, civil or criminal, giving the party producing the same immunity for anything to which he might testify. Properly stated, to give "absolute immunity" in the Federal courts, what would be the effect of such a statute? A witness might be called on in any kind of judicial proceeding and asked for evidence tending to incriminate himself. He demands his constitutional privilege and is shown the statute purporting to give him absolute immunity. Thereupon he "makes it reasonably clear" that the evidence called for will be a link in the chain of facts which will lead to his conviction in a court entirely independent, so far as the jurisdiction of Congress is concerned. Has he absolute immunity? The same reasoning will apply to a general statute of immunity in any of the state courts.

In *Brown v. Walker*<sup>1</sup> the Supreme Court holds the statute, 27 Stat. L. 443, Chap. 83, constitutional. The opinion holds that the prisoner who refused to testify before the Interstate Commerce Commission, on the ground that he would incriminate himself by so doing, was not technically within its terms, but says that even though he was, the statute last mentioned gave him absolute immunity for anything to which he might testify. This not only in the Federal courts, but also, since a Federal statute is the supreme law of the land, in the state courts, and hence he must testify.

A large part of the argument in *Brown v. Walker, supra*, is given to the citing of cases and extracts from state courts; notably *State v. Nowell*<sup>2</sup> and *Kendrick v. Commonwealth*.<sup>3</sup> These cases argue at length that a particular state statute in question gives absolute immunity from prosecution to anything to which the witness might testify. If the reasoning in *Brown v. Walker* is sound, and the Federal power is supreme,

<sup>1</sup> 161 U. S. 591.

<sup>2</sup> 58 N. H. 314.

<sup>3</sup> 78 Va. 490.

how shall a state grant absolute immunity? Suppose the state statute of immunity applied to a prosecution generally, and a witness was called in a state court concerning an inquiry, as to a railroad not complying with a statute in regard to weighing.<sup>1</sup> He claims his privilege on the ground of a possible prosecution under the Interstate Commerce Law. The Federal power is supreme; the state power subject to it; the state grant absolute immunity? Is not this "*reductio ad absurdum?*" In this far reaching decision, *Brown v. Walker*, we have *Queen v. Boyes*<sup>2</sup> cited as showing a mere possibility of prosecution is insufficient and that the danger must be real and appreciable; also that we having adopted certain principles of natural justice from the mother country, a certain construction there should be ours; citing *Cathcart v. Robinson*,<sup>3</sup> *McDonald v. Hovey*.<sup>4</sup> We stand ready to admit both propositions in that case, and wish to carry the last rule over to another case from the mother country, where the danger *was appreciable* when made "reasonably clear." This case was decided a little later than *Queen v. Boyes, supra*, but for our purpose at the same time. The United States Government, just after the Civil War, brought proceedings in an English court to get possession of a fund held by one McRea in England as an agent of the Confederate States. When called as a witness McRea stood on his privilege granted by the common law and pleaded a United States statute which might subject him, as a promoter of the Confederate cause, to forfeiture of goods. The case went off on other grounds, but it was distinctly argued at length that McRea, having pleaded the statute, could not be compelled to testify concerning anything tending to subject him to forfeiture.<sup>5</sup> We conceive that such a case might arise in America and certainly there is no power in such independent sovereignties to grant immunity from the laws of the other. Even the Federal Government

<sup>1</sup> Starr & Curtis An. Statutes, Ill. Chap. 114, pp. 139, 140.

<sup>2</sup> 1 B. & S., 311, 321, decided May 27, 1861.

<sup>3</sup> 5 Peters, 264.

<sup>4</sup> 110 U. S. 619.

<sup>5</sup> U. S. v. McRea, L. R. 3 Ch. Appeal, 79, by Lord Chelmsford.

cannot say "No person shall be prosecuted or subjected to any forfeiture, etc., for or on account of any transgression, etc., the aforesaid commission, etc." if that person's testimony will make him liable, criminally, under the laws of a foreign nation, as in the case of *McRea*.

The chief argument, as we understand the case of *Brown v. Walker*, for the position of the majority of the court, is, that by Article 6 of the Constitution, the Federal law-making power is made supreme.<sup>1</sup> These cases are all on the power of Congress to suspend the running of a state statute of limitations during the continuance of hostilities and when local courts are closed. The statutes were generally upheld on the principle of the war power granted to Congress. It will be found, however, on reading *Hanger v. Abbot*,<sup>2</sup> that the same court declared that state statutes of limitations do not run at such a time, regardless of any Federal statutes on the subject. The Federal statute was, therefore, merely declaratory of what had previously been the law. The cases above referred to do not, therefore, support the position taken in *Brown v. Walker*.

It is admitted that treaties made by the Federal Government are the supreme law of the land. They are made so by the Second Clause of Article 6 of the Constitution, when "they shall be made under authority of the United States." We are not ready to admit, however, that treaties receive their supreme power from this clause alone. The "authority of the United States" is found elsewhere in the Constitution. By the First Clause of Section 10 of Article 1 the states are prohibited from "entering into any treaty alliance or confederation, grant letters of marque and reprisal," and by the Second Clause of Section 2 of Article 2 the President and Senate are vested with the power to make treaties. Treaties always relate to the "external affairs" referred to by Justice Marshall in *Gibbons v. Ogden*, *supra*, concerning which affairs the states have nothing to do. Thus it becomes necessary

<sup>1</sup> *Stewart v. Kahn*, 11 Wal. 493; *U. S. v. Willey*, 11 Wal. 508; *Mayfield v. Richards*, 115 U. S. 137.

<sup>2</sup> 6 Wal. 532.

oftentimes, as the political exigencies of the nation require, that agreements in the form of treaties shall be made with a foreign nation inimical to the interests of this or that state. The framers of our fundamental rules of government were wise enough to see this, and amply provided for it by making treaties the supreme law of the land.

Can it anywhere be shown in the Constitution that the states are prohibited from exercising the legislative function except in special cases? In Article 6 "The Constitution and laws made in pursuance thereof" are made the supreme law of the land. By virtue of what power granted by the states can it be said that, in pursuance of which, Federal statutes shall be supreme over the states in all things, as the decision in *Brown v. Walker* would indicate they are? or, to be more specific, if that decision is not meant to be carried so far, that Congress can control state courts so far as the prosecution of crime is concerned, or so far as the admission of certain kinds of evidence is concerned? There are a large number of cases in the state courts along this line, but we know of none except *Brown v. Walker*, in the Supreme Court of the United States. Most if not all of the cases in the state courts are on the power of the Federal Government to tax the processes of a state court, and they are uniformly against this proposition except one—*Liederkrantz v. Schlemann*<sup>1</sup>—and this case does not refer to *Walton v. Bryenth*,<sup>2</sup> decided a short time previously in exactly the opposite way. Neither of these cases have a full or practically any discussion. All or nearly all the others of these cases referred to cite at length *McCulloch v. Maryland*,<sup>3</sup> where Chief Justice Marshall says "the power to tax is the power to destroy," and hence decides that the states cannot tax the agencies of the Federal Government. He also says that it makes no difference that the tax is low and may not be a burden. It is the *power to destroy* at which he aims. Such being the case, these state decisions go on the principle that states, their courts and the

<sup>1</sup> 25 How. Prac. N. Y. 388.

<sup>2</sup> 24 How. Prac. N. Y. 35.

<sup>3</sup> 4 Wheaton, 316.

means of exercising governmental functions have the constitutional right to exist, and they hold that the Federal Government has no power to use a means which may in the end destroy what the state has a right to enjoy.<sup>1</sup> In the last case cited we have a unanimous opinion from the Supreme Court of Michigan, when that court had some of the most illustrious judges of any court of America on its bench—Campbell, Cooley, Christiancy and Martin. We append here a part of Justice Campbell's opinion :

"And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the states."

"Presented in this form, the inquiry involves little short of an absurdity. It is one of the cardinal principles of political science that no government can exist without a judicial system . . . A state without courts to enforce its own laws is an impossibility, and if Congress can destroy or control the state judiciary it can utterly abrogate the state itself."

"No one would contend that the system of government established by the Constitution of the United States can possibly permit of any diminution by the general government of any of the functions which are left under state control. The judicial powers, like other powers of the Union, are enumerated. They do not cover any considerable number of these subjects which concern the ordinary interests of the people. They punish no ordinary local crimes against the peace and good order of society committed within the states, and they can entertain jurisdiction in no ordinary litigation between members of the same community. . . . Our whole system is based upon the principle that local affairs must be administered by state authority, unless where peculiar circumstances have led to the establishment of definite exceptions resting on special reasons of public policy. The same power which established the departments of the general government determined that the local governments should also exist for their

<sup>1</sup> *Smith v. Short*, 40 Ala. 385; *Warren v. Paul*, 22 Ind. 281; *Jones et al. v. Estate of Keep*, 19 Wis. 369; *Sayles v. Davis*, 22 Wis. 225; *Fifield v. Close*, 15 Mich. 505.

own purposes, and made it impossible to protect the people in their common interests without them. . . . There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any state authority within its lawful bounds."

If the Federal Government may not destroy state courts or control their evidence by taxation, which must necessarily be by statute, then we can see no way in which it would be possible for them to control the states or their courts directly by legislation, as is attempted by 27 Stat. L. 443, Chap. 83, if the decision in *Brown v. Walker* is right.

We are not informed of an attempt by any of the states to pass a general statute of immunity. It may be argued that, where these statutes relate only to transgressions of a particular kind, that the foregoing reasoning may not apply. This objection seems to have merit. The statute may relate only to bribery, as in Illinois,<sup>1</sup> or the state police, as formerly in Massachusetts,<sup>2</sup> or the violation of the Interstate Commerce Law, as in the Federal jurisdiction.<sup>3</sup> These are offences against the particular jurisdiction alone, where no testimony relative to the issue would tend to criminate, it would seem, in any other jurisdiction. But who can say where such testimony would lead? Suppose, in order to investigate a question of unjust discrimination under the Interstate Commerce Law, a railroad official were asked for certain weights of grain shipped by different parties. He refuses to answer, on the ground that it would tend to incriminate him; and he makes it reasonably clear that the answer would tend to incriminate him, or subject him to a penalty in Illinois<sup>4</sup> or some other one of the states. A charge of bribery in the State of Illinois might, in the investigation of it, lead to a demand for testimony which, considering "the relation of the witness to the subject-matter of inquiry and character and scope of the question," would tend to disclose a link in the chain of evidence

<sup>1</sup> Chap. 69, Criminal Code.

<sup>2</sup> *Emery's Case*, *supra*.

<sup>3</sup> 27 Stat. L. 443, Chap. 83.

<sup>4</sup> *Starr & Curtis An. Sta.*, Chap. 114, pp. 139, 140.



upon which the witness might be prosecuted outside of the state jurisdiction. Of course, the witness must make it reasonably clear that such is the case.

As a corollary of the principle which has been mentioned, viz., that the witness must make it reasonably clear that the testimony asked for would tend to incriminate him, the party called as a witness must, in order to secure his constitutional privilege, plead the law of a foreign nation if the penalty of such law is the one from which he demands immunity.<sup>1</sup> The rule would be the same if the law of another of the states of the Union was relied on, and such law in any way was different from or in any way changed the common law. If, however, the law of the other state was a common law principle, it would not be necessary to plead it to secure immunity from it, because the common law will be presumed to be the law of the sister state.<sup>2</sup> The rule would be otherwise if a witness in a state court relied on a Federal statute. State courts take judicial notice of the acts of Congress.<sup>3</sup> A witness demanding his privilege on a statute of which the trial court does not take judicial notice need only bring such a statute to the notice of the court in order to demand his privilege. This was decided by Lord Chelmsford in *The United States v. McRea, supra*.

The reader will have noticed that pardons, acquittals, convictions and statutes of limitations have been mentioned as protecting a witness against any prosecution to which any matter he might testify to would subject him. The question as to whether an accused can be prosecuted on the same charge after an acquittal or conviction was settled early in the history of our law, and is made doubly sure by the very general constitutional provision, that an accused shall not be twice put in jeopardy of life or limb on the same charge. A large

<sup>1</sup> *King of Two Sicilies v. Wilcox*, 1 Sim. (N. S.) 301, by Lord Cranworth.

<sup>2</sup> *Storey*, Conflict of Laws, Sec. 316; *Williams v. Wade*, 1 Metc. 82; *Abell v. Douglass*, 4 Denio, 305; *Kernot v. Ayer*, 11 Mich. 181; *Schurman v. Marley*, 29 Ind. 458; *Mendenhall v. Gately*, 18 Ind. 149.

<sup>3</sup> *Murry v. City of Butte*, 7 Mont. 61.

number of courts have also decided that a pardon or a statute of limitation is a bar to future prosecution.<sup>1</sup>

Thus a party called upon to give testimony tending to incriminate himself cannot claim his privilege when a pardon, acquittal, conviction or the statutes of limitation intervene to protect him. Where the statutes of limitation are relied on, however, to compel a party to testify, it is not enough to show that the time necessary to the operation of the statute has elapsed without conviction, but it must be affirmatively shown that no prosecution is then pending.<sup>2</sup> If the offence sought to be brought to light is such a one as we have discussed in this article, one which might bring to light a criminal infraction of law in a different and independent jurisdiction, it would be necessary to show that the reason relied on to compel the witness to testify was as broad as the privilege of which he was deprived.

It has been suggested that the kind of statute in question might be made effective by both the United States and all the states uniting in passing a similar statute which would be broad enough to cover "any pleading and discovery or evidence obtained from a party or witness by means of any judicial proceeding in this or any foreign state or country shall be given in evidence, etc." Granting that if such a visionary thing were possible, the real difficulty arises in the matter of compelling a witness to plead a pardon, acquittal, conviction or statutes of limitation or of immunity which may effect him in another jurisdiction. So long as the court must take judicial notice of a statute as a Federal statute in both Federal and state courts then this difficulty will not arise. But no sooner does the opposite rule come into effect, that a court does not take judicial notice of the various statutes and judicial acts, then the witness who does not wish to give testimony against himself may plead the statute of the state

<sup>1</sup> *Reg. v. Boyes*, 101 E. C. L. 327; *Weldon v. Burch*, 12 Ill. 374; *Williams v. Farrington*, 2 Cox Chan. 202; *Roberts v. Allat*, 22 E. C. L. 288; *People v. Mather*, 4 Wend. 252; *State v. Wharton*, 3 S. W. (Tenn.) 490; *Manchester R. R. Co. v. Concord R. R. Co.*, 20 Atl. (N. H.) 383; *Child v. Merrill*, 66 Vt. 302.

<sup>2</sup> *Salina Bank v. Henry*, 3 Denio, 593; *Southern R. R. News Co. v. Russell*, 91 Ga. 808.

where he may be convicted of some crime as to which he is asked to testify, and though it may be possible he cannot be prosecuted in that state, for that crime, in any court in that state, the court cannot take judicial notice of the fact nor can the accused be compelled to plead it.<sup>1</sup> With such a state of facts a state statute of the kind in question would be unconstitutional, and the whole fabric so carefully woven would fall to pieces. We believe we have shown that, except for the case of *Brown v. Walker*, it is impossible for either the state or Federal Government to grant "absolute immunity," and this case, it seems to us, upon another hearing of the same proposition, could not be decided in the same way. It is not necessary, therefore, in order to show that statutes of immunity or indemnity are unconstitutional, to refer to the doubtful and speculative arguments, as to whether a witness will be compelled to testify to such matters as will disgrace him in the eyes of his neighbors; nor is it necessary to determine whether the framers of the Constitution intended that the declaration that "No man shall be compelled in any criminal case to be a witness against himself," might be annulled by granting immunity.

Since the Counselman case, *supra*, has thrown the weight of its authority on the side of the right of the witness called to testify to matters which will tend to incriminate him, the true rule undoubtedly is, that a statute of indemnity must furnish absolute immunity. This means that a person cannot be compelled to testify if there is any possible way in which his answers may tend to incriminate him in the jurisdiction in which he is called, or in any other jurisdiction, provided he brings it to the knowledge of the court that he is opening the way for a prosecution in such other jurisdiction. This immunity the courts have declared to be the measure of the ancient common law rule as it is declared in the Constitution of the United States.

Although the legislatures of the various states or, Congress, may change or abrogate a common law privilege, they cannot change a constitutional provision, at least, without granting an equivalent. This, we believe, we have shown they cannot do.

Chicago, December, 1898.

*Charles E. Lahman.*

<sup>1</sup> *Wilson v. United States*, 7 Peters, 150.

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ADMIRALTY.

Judge Thomas, of the District Court for the Eastern District of New York, recently handed down a very interesting opinion: *The Strabo*, 90 Fed. 110. It is not often that a jurisdictional question arises now, as the limits of the admiralty jurisdiction are so well settled. In the present case a workman on a vessel lying at a dock fell from a ladder, which was not properly secured to the ship's rail, owing to the master's negligence, and struck on the dock. The claimant excepted to the court's jurisdiction on the ground that the injury was received on land. The court grouped the cases into two classes—the first, where the primal cause arises on the ship and is communicated to property on the land, the court of admiralty having no jurisdiction; and the second, where the conditions are just reversed and the jurisdiction of the court is conceded. The learned judge observed that the cases usually showed a negligent act or omission arising in one locality, and communicated to the libellant or his property in another, and did not think they had intended to decide that the injury must be *completed* on the water to give jurisdiction, irrespective of the locality where the breach of duty first operated upon the person injured. "The more consistent rule," said the court, "seems to be that a court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect and produces injury to the person or property of another on navigable waters. In that case it would be unimportant where the breach of duty occurred, or where the physical injury was completed." The admirable reasoning of the court very ably supports its conclusions, and, as they do not conflict with the cases of *The Plymouth*, 3 Wall. 20; *Johnson v. Elevator Co.*, 119 U. S. 388; *P., W. & B. R. R. Co. v. P. & H. de G. St. Towboat Co.*, 23 How. 209, and other decisions known as "mixed cases," this opinion may be regarded as a distinct contribution to the subject.

## ADMIRALTY (Continued).

One of the results directly contemplated by Congress in the passage of the Harter Act was reached by Brown, J., in the case of *The British King*, 89 Fed. 872. The court held that the vessel was not liable for the negligence of her officers in failing to take soundings and apply the pumps, although it was known that there was a leak likely to cause damage to the cargo.

The decision in the case of *Car Float No. 4*, 89 Fed. 877, should be called to the attention of the owners of all such floats. It imposes the duty of providing spare lines to secure them against any possible breaking away from their moorings. The court said: "The mere fact that similar floats have not been in the habit of carrying any spare lines cannot be admitted as a defence, or as dispensing with the requirements of reasonable prudence so long understood and recognized in navigation."

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ASSIGNMENTS FOR CREDITORS.

Assuming that the law of a given jurisdiction permits preferences in assignments for creditors, such preferences are still subject to attack precisely as if they had been given in the form of mortgages or judgments, prior to the assignments. So, in *Wells, Fargo & Co. v. Scott & Co.*, 55 Pac. (Utah) 81, such a preference was assailed on the ground that it secured the debt of a stockholder and officer of the company assigning; but, it appearing that the debt was really the company's, the officer merely signing the note for its accommodation, the preference was sustained.

*Clark v. Richards Lumber Co.*, 77 N. W. (Minn.) 213, defines the extent of the authority of an assignee for the benefit of creditors. Shortly after such assignment by the lumber company, Clark claimed the ownership of a large amount of lumber, which was also claimed by the assignee; pending litigation, it was agreed that it should be sold and the proceeds treated as the original property. After final decision in Clark's favor it is now held that he is entitled to the whole fund, and that the assignee may not deduct therefrom his share as creditor of the company, of the expenses of administration. *Hooven v. Burdette*, 39 N. E. 1107, was distinguished on the ground that the plaintiff there had agreed that the disputed property should remain in assignee's hands.

## BANKRUPTCY.

The National Bankrupt Law of July 1, 1898, while it provides that it shall go into full force and effect upon its passage, nevertheless prohibits the filing of petitions for **Bankrupt Act,** involuntary bankruptcy within four months. In **Time of Going** *Blake v. Francis-Valentine Co.*, 89 Fed. 691, the **Into Effect** company on August 31, 1898, had, while insolvent, permitted its property to be attached by one of its creditors; upon bill filed by one of the creditors to restrain a sale by the sheriff, it was held (1) that the relation of debtor and creditor was to be governed by the act from the date of its passage, and (2) that the general powers of the Court of Bankruptcy were sufficiently broad to protect this property, even though no bankruptcy suit was, or could be, pending in the court at that time.

General orders in bankruptcy have, in accordance with **Orders and** the provisions of the act, been published by the **Forms** Supreme Court, 89 Fed. 769. The "Forms" mentioned in Order 38 are promised for January, 1899.

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## CARRIERS.

The Supreme Court of Tennessee has decided that notice by printing a condition on the face of a ticket, *e. g.*, "Good for one continuous passage, beginning on day of sale only," with the date stamped on the back, **Additional** together with placards posted up in the stations **Tickets,** and elsewhere to the effect that "local tickets" **Sufficient** would be subject to the before-mentioned condition, is not **Notice** sufficient where the passenger paid the usual fare: *Louisville & N. R. v. Turner*, 47 S. W. 223.

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## CONSTITUTIONAL LAW.

That provision of the War Revenue Act laying an excise tax on board of trade sales was sustained by Showalter, Cir. **War Revenue** J., in *Nicol v. Ames* (Northern District of Illinois), **Act of 1898,** 89 Fed. 144. The provision in question, found in **Excise on** paragraph 2 of Schedule A of the act, reads: **Board of** "Upon each sale, agreement of sale, or agreement **Trade Sales,** to sell, any products or merchandise at any ex- **Uniformity** change, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars . . . one cent; provided that on every sale . . . there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence, . . . which shall

## CONSTITUTIONAL LAW (Continued).

have upon it in stamps the amount of the tax." On *habeas corpus* by Nicol, a member of the Chicago Board of Trade, imprisoned for failure to comply with the act, it was contended that the provision requiring a written memorandum was in excess of Congressional power, as invalidating an oral **Intrastate Contract** contract made in the course of intrastate, as distinguished from interstate, commerce. But the judge points out that the law does not make the oral contract void; it simply provides a penalty for the absence of a document, leaving untouched the obligation of the contract. There was a further objection, that the tax, being on documents used in certain transactions only, violates the rule of uniformity laid down in Article 1, Section 8, of the United States Constitution. But the court considered that the tax is really on the transaction, not on the documents which evidence the transaction. The documents were held, quoting Marshall's historic language in *McCullough v. Maryland*, to be merely means appropriate to the end of taxation.

A Wisconsin law (L. 1897, c. 334, § 3), providing that whenever the property of a debtor is levied on or attached by any process, the debtor may, within ten days, make an assignment for the benefit of his creditors, which shall dissolve absolutely the levy or attachment, was pronounced unconstitutional as to prior debts: *Peninsular Lead & Color Works v. Union D. & P. Co.* (Supreme Court of Wisconsin), 76 N. W. 359, following *Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31. Cassoday, C. J., dissenting, said: "To my mind the obligations of the contract were not impaired by the mere modification of the statutory remedy, so far as to dissolve the attachment, if made within ten days prior to the debtor's assignment." The learned justice had dissented in the former case also.

## CONTRACTS.

A very interesting case as to the granting of injunctions in cases of contracts for personal service, in restraint of trade, is **Contract for Personal Services, Restraint of Trade, Injunction** *William Robinson & Co., Limited, v. Heuer* [1898], 2 Ch. 451. In this case, by an agreement in writing, H. agreed to serve the plaintiff company as confidential clerk for a term of five years, the company having the option to renew the engagement for five years more. The company could dismiss H. at



CONTRACTS (Continued).

any time by three months' notice. H. agreed that during the term he would devote his whole time and attention to the business of the company, and that he would not during the engagement, without the consent of the company, engage as principal or servant in any other business upon pain of dismissal. H. further agreed that if he should be so dismissed he would not at any time within three years from his dismissal be engaged as principal, agent or servant in the business of dealer of wares of the description made by the company within 150 miles of W. In 1898 H. left the service of the company without leave and became traveller to another firm carrying on the same business, and the company applied for an injunction to restrain him during the term of service from engaging in this employment. Held, that, during the continuance of the engagement, the agreement made by H. that he would not engage in any business relating to goods sold by the plaintiff, was valid, though not restricted in point of space, and that it was severable from the agreement not to engage in any other business, and should be enforced by injunction. The injunction was therefore granted, but limited to the first term of five years, the plaintiff waiving his option to retain H. in his service for another five years, and the court doubting whether the agreement for that term ought to be enforced.

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CORPORATIONS.

The Supreme Court of Arizona has lately been called upon to protect minority stockholders against a majority who, with the corporate officers, were controlling the corporation's business in the interest of a rival concern with which the officers and the majority were connected. The corporation was one formed to build a canal and deliver water to the stockholders. The complainants united in their bill prayers for relief, based upon their rights as stockholders, with others based upon their rights as original appropriators of water. The court below of its own motion dismissed the bill for this misjoinder; but on appeal the court leniently permitted an amendment and the filing of a supplemental bill inasmuch as the complainants, if driven to new suits, would have found themselves barred by the statute of limitations; *Henshaw v. Salt River Val. Canal Co.*, 54 Pac. 577.



## CORPORATIONS (Continued).

It should seem that the distinction is clear between the liability of the stockholder for unpaid balances on his stock and his statutory liability to contribute to pay the corporation's debts. In the one case the liability is an asset of the corporation which a creditor can enforce only in equity and upon the theory that his suit is a garnishment proceeding. In the other case, the right against the stockholder runs directly to the creditor and may be enforced by him in an action which is, in substance, an action against a guarantor or surety. The distinction is not affected by the fact that the fruits of the action to enforce the statutory liability belong to all creditors ratably, nor by the circumstance that all stockholders within the jurisdiction must be made parties defendant. Their liability is several in substance, though joint in form. Those not joined, are not released by a judgment against the rest. Therefore, those not joined, should not, in a subsequent proceeding, be concluded by the judgment previously rendered against their fellows. Yet, the Supreme Court of Minnesota in *Hanson v. Davison*, 76 N. W. 254, while admitting that a stockholder, not a party to the original action to enforce the statutory liability, is not released by the judgment rendered therein, has declared that he is concluded by it as respects the existence and amount of corporate debts. The dissent of Cauty, J., points out the inconsistency.

The New Jersey Court of Chancery, in *Tennant v. Appleby*, 41 Atl. 110, permits itself to speak of the "rule in equity" that the directors of a corporation upon its insolvency become trustees for its creditors, citing *Montgomery v. Phillips*, 53 N. J. Eq. 203, and *Savage v. Miller*, 39 Atl. 665. The former was a case of fraudulent preference. The latter was a case in which the court permitted a preference in favor of creditors related to directors by "consanguinity, affection and professional relationship." There was, indeed, some ground for treating the preference of the director-creditor in *Tennant v. Appleby* as tainted with fraud; but the court preferred to base its decision on the so-called "rule" as above stated. This is unfortunate, for nobody has ever yet succeeded in working out a consistent and tenable theory of trusteeship for creditors, and it is safe to say that nobody can. Directors are not trustees of the corporate property for creditors either before or after insolvency. This is evident from the fact that

**Statutory  
Liability of  
Stockholders  
for Corporate  
Debts**

**Insolvent  
Corporations,  
Preference of  
Directors**

CORPORATIONS (Continued).

they do not hold the legal title to the property of the corporation—and no one ever heard of a trustee without a legal title. Sir George Jessel expressed his opinion of the so-called “rule” in *In re Wincham Shipbuilding Co.*, 9 Ch. Div. 322. Nor will it do to say that they are trustees, “metaphorically speaking.” Mr. Justice Brewer assigns a suitable place to metaphor in the statement of a legal doctrine in *Hollins v. Brierfield Co.*, 150 U. S. 371. Preferences ought, perhaps, to be made void by statute in the case of individuals and of corporations too—except where the facts are like those in *Sanford Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312. Corporate preferences were forbidden by statute in New Jersey prior to 1875 and since 1895. But unless some such statutes are passed, it is idle to attempt to invalidate *bona fide* preferences of corporate creditors, whether the creditors happen to be stockholders, directors or strangers. In the case of the stockholder-creditor, indeed, there is room for an argument against the preference on the partnership principle that a partner cannot compete with creditors in the distribution of the firm estate. This thought has not, so far as the writer knows, been developed by any court.

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CRIMINAL LAW.

The Supreme Court of Rhode Island, in *Wills v. Jordan*, 41 Atl. 233, decided that the statements of confessed principals in a felony, that another was also concerned, **Arrest on Suspicion** are not of themselves sufficient to justify a constable in arresting that other on the ground of suspicion.

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ELECTIONS.

Where a contention arises between two conventions of the same political party as to which is entitled to have the ticket nominated by it placed upon the official ballot **Party Conventions, Ballots** under the recognized party name, held, that that convention is entitled which has been called by the regular state central committee of the party: *Williams v. Lewis* (Supreme Court of Idaho), 54 Pac. 619.

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EVIDENCE.

*State v. Burlingame*, 48 S. W. (Mo.) 72, an illustration of a type of criminal cases which is becoming too familiar, con-

## EVIDENCE (Continued).

**Insolvent Banks, Receiving Deposits with Knowledge of Insolvency** tains several interesting rulings: (1) That in a trial upon the charge of receiving deposits while the bank was insolvent, acquittal on a similar charge for receiving a subsequent deposit is no defence; (2) evidence of a financial panic at the time are properly excluded, as, if proved, it would be no excuse for the commission of the offence; (3) evidence as to the receipt of other deposits was immaterial, and should not have been received even for the purpose of showing knowledge by the defendant that the bank was receiving deposits.

In *Long v. State* (Criminal Court of Appeals, Texas), 47 S. W. 363, the defendant was accused of burglary, and evidence of his participation in another precisely similar burglary was held inadmissible, although it corroborated the testimony of an accomplice. **Similar but Disconnected Offences** The mere fact that the two offences are precisely similar do not make them parts of a system or comprehensive scheme of crime so as to render the one evidence of the other, nor will evidence inadmissible *per se* be admitted, because of its tendency to corroborate the testimony of an accomplice.

This is a striking instance of the rule that mere similarity cannot render the fact of commission of one crime admissible to prove the commission of another, nor will the greatest similarity in details, without more, render the one evidence of a general system of crime, in the execution of which the other was committed. The similar offence must clearly show some general comprehensive scheme of crime, in the execution of which each separate offence became necessary, as in the Molly Maguire cases in Pennsylvania. See *Com. v. Carroll*, 84 Pa. 107.

## GUARANTY.

In *Fulton Grain Swill Co. v. Anglim*, 54 N. Y. Suppl. 32, it was properly held that a guarantor of the price of goods sold and delivered could not defend on the ground **Defences by Guarantor** that the purchaser had in turn sold them to others than those he had agreed to sell them to. Failure of consideration as between principal and guarantor is a matter of no moment to the creditor.

Of a different character was the defence in *United States to use v. American Bonding and Trust Co.*, 89 Fed. 921. Here the defendant became surety for Minor & Bro., upon the assurance, *inter alia*, by the use plaintiff that Minor & Bro.

**GUARANTY (Continued).**

were under no liability, whereas at that very time they were indebted to the plaintiff for a considerable sum. Of course, the defendant was discharged from liability. Contrasting it with the previous case, it is obvious that, whether one calls it lack of consideration, misrepresentation or fraud, we have here a positive piece of misconduct by the creditor himself for which he should be held responsible. Besides, the receipt by the creditor of the principal's note would in itself have discharged the surety: *Rees v. Barrington*, 2 Ves. Jr. 540.

**GUARDIAN AND WARD.**

Of interest at this time is the decision of the District Court, N. D. of California, in *In re Perrone*, 89 Fed. 150, where construing § 1117, Rev. St., requiring the consent of the parents or guardians of a minor to his enlistment in the military service of the United States, "provided that such minor has such parents or guardian entitled to his custody and control," the court holds that it does not authorize a court to discharge from such service a minor whose parents are non-resident aliens, and who at the date of his enlistment had no guardian, on the application of a guardian since appointed.

**HUSBAND AND WIFE.**

*Jones v. Gutman*, 41 Atl. (Md.) 192, is an illustration of the constantly recurring question as to the wife's agency to represent her husband and purchase on his credit. *Debenham v. Mellon*, 6 App. Cas. 24, has gone a long way to clear up the law by deciding that marriage itself creates no agency, and if the husband is to be held, an authority to the wife, express or implied, must be proved. For failing to recognize this principle, the judgment of the lower court was reversed.

*Mills v. Mills* [1898], 2 Ch. 504, is an unusual case. On March 15, 1879, a man and woman executed a marriage settlement, containing a covenant to settle certain after-acquired property on the wife. On May 7, 1879, another settlement was made, also containing an after-acquired property clause more liberal to the wife. Upon petition filed by wife against her husband's executors, she claiming under the second settlement, it was held that, though the first settlement might have been varied by the parties, yet, in the absence of all evidence as to why it had

**HUSBAND AND WIFE (Continued).**

been executed, the second settlement, in so far as it contradicted the first, was not a revocation of it.

A rather unexpected construction was put by the Supreme Court of Pennsylvania in *Rockwell v. Waverly Traction*, 41 Atl. 324, upon the Act of May 8, 1895, P. L. 54. For an accident happening after that date to a wife, her husband and herself brought separate suits; upon the trial of her suit, he asked to be made a party—a request which upon defendant's objection was refused by the court. In spite of the apparently mandatory provisions of the Act that the suit shall be joint, it was held that plaintiffs could recover.

**INSOLVENCY.**

The Illinois Supreme Court has adopted the wholesome modern rule that while an insolvent corporation may, unless forbidden by statute, prefer an ordinary creditor by judgment or otherwise, yet such preference cannot be given to one of its own directors. It was held, in *Rockford Grocery Co. v. Standard Grocery Co.*, 51 N. E. (Ill.) 642, that this rule does not invalidate a preference given to a creditor whose debt was guaranteed by a director, the right of the *bona fide* creditor being emphasized by the court.

**LIBEL AND SLANDER.**

An interesting case on the question of privileged communications was *Trebb v. Transcript Pub. Co.*, 76 N. W. 961. In this case a city council passed a resolution in which they characterized the plaintiff as a disreputable person; that he maliciously and knowingly published in a newspaper a false report of a certain suit in which the city had been interested, and they condemned his conduct as execrable and odious, and as having caused the city irreparable damage. The defendant published this resolution in its newspaper, and the plaintiff sued it for libel. Held, that it was libelous *per se*; that councils have no more right to traduce a man's private character than any other body of private citizens; that the resolution was outside of the duty of councils, and the fact that it was published in good faith as a matter of news would not excuse the defendant.

# MASTER AND SERVANT.

The so-called "carriage cases," *Laugher v. Pointer*, 5 B. & C. 547, and *Quarman v. Burnett*, 6 M. & W. 499, receive an interesting addition in *Jones v. Scullard* [1898], 2 Q. B. 565. An accident occurred on the day of the Queen's jubilee, by the hired driver of defendant's brougham, with defendant inside, negligently losing control of defendant's horse. The brougham and horse were kept at a livery stable, whose owner, as in this instance, provided the driver. It was held by Russell, C. J., that there was evidence from which a jury might find that the driver was at the moment acting as servant of the defendant. And this would seem to be the sensible solution of the difficulty, rather than attempting to lay down as matters of law that certain varying facts do or do not constitute the relation of master and servant.

It is hardly necessary at the present day to cite authorities to show that a servant engaged for a term renders himself liable to discharge before the expiration of the term by disobedience to orders. *Gallagher v. Wayne Steam Co.*, 41 Atl. (Pa.) 294, is the most recent case of the kind.

## MORTGAGES.

The claim of the holder of a chattel mortgage, given as security for the payment of purchase money, may be defeated by the mortgagor's proving a breach of warranty which damaged the mortgagor to a greater extent than the unpaid purchase money: *Hennessey v. Barnett*, 55 Pac. (Colo.) 197.

*American Baptist Union v. Weeks*, 77 N. W. (Minn.) 36, reversing same case, 75 N. W. 713, presents a great variety of judicial opinion on the subject of the duty of a junior mortgagee. W, as second mortgagee, in order to save the property, paid the taxes for 1889, taking an assignment certificate; subsequently he obtained both by foreclosure, subject to plaintiff's mortgage. In 1895 plaintiff foreclosed, and had to pay delinquent taxes of 1893-4. In 1896 plaintiff, under protest, redeemed from sale for 1889 taxes and sued Weeks for reimbursement; he proved that he had paid out more than he had received during his occupation. Upon the first argument judgment for plaintiff was affirmed on the theory that he stood in the shoes of the original mortgagor, having taken an assignment of mortgage

## MORTGAGES (Continued).

from him; and, further, that though he had originally the right to reimbursement, he lost it by his failure to pay the taxes of 1894-5.

Start, C. J., and Buck, J., dissented on the ground that, though he did not have to pay the taxes of 1889, yet the payment enured to the protection of the first mortgagee, who, if he wants the benefit of it, must pay for it. This is practically the view now adopted by the court, per Mitchell, J., who held that W had no duty to pay these taxes, and as owner in possession had performed his obligation. Canty, J., while agreeing that the former opinion was wrong, dissents on the ground that the second mortgagee has the same duties as the original owner.

The latter opinion is cited with approval in *Darelins v. Davis*, 77 N. W. (Minn.) 214, holding that, as there is no duty on the second mortgagee to pay the interest on the first mortgage, he may as creditor redeem the land from purchaser at sheriff's sale under first mortgage; also that a foreclosure for one installment of the mortgage debt exhausts the lien of the mortgage.

A calf is a curious kind of after-acquired property; yet in *Bank v. Baker*, 41 Atl. (N. J.) 704, it was held, on the faith of the maxim *partus sequitur ventrem*, that a chattel mortgage of a cow, as against subsequent mortgagees, covered her after-born calf, even though not mentioned in the mortgage. It was intimated by the court that the mortgagee's title would not have prevailed as against a *bona fide* purchaser for value.

The cases are numerous which discuss under what circumstances a trustee of real estate has power to mortgage it, though it is really in each case simply a question of the construction of the language of the will. In *Durell v. Bellinger* [1898], 2 Ch. 534, a general power of sale or postponement, and to make outlays from income or capital for improvements, repairs, etc., was held to confer, by implication, a power to mortgage for the purposes for which outlays were authorized.

B, holding a mortgage on A's land, which had been subsequently, without B's knowledge, conveyed to C, delivered to C who was his financial agent, a satisfaction of the mortgage, to be filed when the mortgage was paid off. C, through inadvertence, filed it of

Increase,  
Chattel  
Mortgage

Power of  
Trustees to  
Mortgage

Satisfaction,  
Mistake in  
Filing



**MORTGAGES (Continued).**

record and subsequently made assignment for creditors to D. Upon bill by B's executors to have satisfaction cancelled, D defended on ground that rights of C's creditors would be thus impaired. There was a decree for plaintiff, there being no equitable estoppel because it was not proved that C's creditors knew of or suffered by the satisfaction: *Wilson v. Kelly*, 76 N. W. (Minn.) 258.

The question involved in *Bishop v. Kent & Stanley Co.*, 41 Atl. (N. J.) 255, was the validity of a corporate mortgage, which had been executed without the consent of the 75 per cent. of the stockholders required by charter. It does not appear that the holder of the mortgage had any knowledge of this defect; and if so, in accordance with the weight of authority (see *Bank v. Turquand*, 5 E. & B. 248, 6 E. & B. 327; *Webb v. Commissioners*, L. R. 5 Q. B. 642; *Hackensack Co. v. DeKay*, 36 N. J. Eq. 548), he is not bound to investigate the indoor management of the company, and may assume that the requirements of the charter have been complied with. For some reason, not apparent, the court did not place its decision on this ground, but held that, as the provision was intended only for the benefit of stockholders, the mortgage was not void, but voidable by them. It followed that, as they had not attacked it, but on the contrary had acquiesced in it by allowing the payment of interest upon it, the unsecured corporate creditors could not attack it.

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**NEGLIGENCE.**

The Court of Appeals of Colorado, in *Walters v. Denver Consol. Electric Light Co.*, 54 Pac. 960, decided that a mother who voluntarily takes hold of her child in an endeavor to remove him from contact with a live electric wire is not negligent, whether she is aware of the danger or not, and that she can recover from the company for her injuries if the latter has been negligent. In this case, which was an action by a boy and his mother, a naked wire was placed on a house near a window and within reach of it. The room in which the window was placed was occupied by a child of twelve years. The insulator became detached from the wire and the boy attempted to replace it, whereby he was injured. Held, whether putting an exposed live wire in such a place was negligence was for the jury, and that whether the boy was



**NEGLIGENCE (Continued).**

negligent in taking hold of it was also for the jury. Held, also, that the mother in taking hold of him, whereby she also was injured, was not negligence, the court saying: "To say that an act to which her affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind."

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**PARENT AND CHILD.**

The fallacy of the rule which imputes the negligence of a father or attendant to an infant of tender years is demonstrated in a singularly well-reasoned opinion of the Kentucky Court of Appeals, in the case of *Ry. Co. v. Herrklotz*, 47 S. W. 265, where the child injured was under four years of age, and where they refused to allow the doctrine of imputed negligence to be imported into the case, holding that the right of the infant to recover damages for an injury was as much his own as an estate conferred by a gift, and a third person's wrong or delinquency should not be allowed to affect one any more than the other.

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**PARTNERSHIP.**

In *Hoopes v. Hartwell* (Colorado Court of Appeals), 54 Pac. 64, the plaintiffs sued B, C and D, as partners, for goods sold and delivered. It appeared that the plaintiffs had made a number of sales to the defendants at a time when they were doing business under a firm name; but the goods, for the price of which the suit was brought, were sent to a new branch establishment at a different town, and the plaintiffs were directed to bill goods so sent to B alone. The question was whether B alone was liable or whether the debt in suit was a partnership debt. On such an issue it seems clear that the plaintiffs should have been given an opportunity to prove admissions by C and D that the branch establishment was a firm enterprise and that their only desire was to keep the accounts separate. Evidence of such an admission was, however, excluded by the trial judge, as was also the testimony of one familiar with the creditors' business, as to who was understood to be the purchaser of the goods and on what credit they were delivered. Moreover, the trial judge, in charging the jury that all the defendants were liable for the debt unless they had notified the plaintiffs of a dissolution of the firm, qualified his

PARTNERSHIP (Continued).

charge that this was true unless the plaintiffs had *waived* their rights against the defendants. The judgment was reversed for the improper exclusion of evidence, and also on the ground that the jury was very probably misled by the use of the word "waiver" in a case in which the right of the plaintiffs could have been extinguished only by a *release*. The court has done a service to legal progress in insisting upon an accurate use of legal terminology. The term, "waiver," is almost as much abused as "estoppel" and "trust."

A and B, partners, made a general assignment of firm and separate estate for the benefit of creditors. The firm estate was exhausted before the firm debts were paid, and certain firm creditors, who had not yet reduced their claims to judgment, obtained nothing. The assignee was discharged; B acquired real estate and died, leaving separate debts, incurred subsequent to the assignment, which exceeded the amount of the property so acquired. The question was whether unpaid firm creditors should be excluded from competing with the separate creditors in the distribution of the proceeds of the sale of the real estate. The surrogate properly applied the principle that there can be no marshaling in favor of the separate creditors in a case where there are not two funds. In other words, on such a state of facts, no good reason could be assigned for exercising equitable control of the firm creditor's legal right to satisfaction out of the separate estate of the individual partners: *In re Striker*: *In re Ives's Estate*, 53 N. Y. Suppl. 732.

In *Weil v. Jaeger*, 51 N. E. 196, a banking business was carried on by six partners. A made deposits with them. Subsequently four sold out to two, the two executing the usual bond of indemnity to the four. On the entity theory, this was obviously a sale by the firm to the remaining partners. The two then continued in business and A continued his deposit account (which at that date amounted to about fourteen hundred dollars), and afterwards deposited a little less than five hundred dollars more. The two then made an assignment for the benefit of creditors, and in their schedule of liabilities they put down A's entire deposit as a claim against them. A filed his claim for this amount with the assignee and afterwards brought suit against the six and

Marshaling,  
Joint and  
Separate  
Creditors

Sale of  
Business by  
Firm to  
Single  
Partners,  
Rights of  
Creditors

## PARTNERSHIP (Continued).

recovered judgment. Upon these facts it seems sufficiently clear that A was a separate creditor of the two, and not their partnership creditor, as respects the amount of his claim against the old firm. It seems equally clear that he was a partnership creditor of the two as to the amount of his deposit subsequent to the original dissolution. As to the former sum, he should have been permitted to prove with the separate creditors of the two. As to the latter sum, he should have been permitted to prove with their partnership creditors. For reasons which are not satisfactorily stated, the court permitted A to prove for his whole claim with the firm creditors of the two. It is, however, noted in the report that a re-hearing is pending.

## PLEADING AND PRACTICE.

Two decisions upon the removal of causes from a state court by Simonton, Cir. J., in the Circuit Court of the United States for the Western District of North Carolina, appeared in the same publication on December 27, last: (1) Under the Acts of 1887-88 (March 3, 1887, re-enacted August 13, 1888, 25 Stat., c. 866, 433, 435), prejudice or local influence must be shown to the "legal satisfaction" of the Circuit Court. The amount and manner of the proof required in each case must be left to the discretion of the court; (2) after the term has expired, at which an order for removal on such ground was made, it cannot be reviewed; (3) such a proceeding may be *ex parte* without notice of the application to the adverse party: *Crotts v. Southern Ry. Co.*, 90 Fed. 1. As to 2 see, also, *Parks v. Ry. Co.*, Ibid, 3.

The Circuit Court of the United States for the Eighth Circuit has recently stated the familiar rule that if, in an action for personal injury, the undisputed facts establish the existence of contributory negligence on the part of the plaintiff, it is the duty of the trial court to instruct the jury to find for the defendant. The only question, in the Appellate Court, is whether the trial court ruled rightly in holding that the defence of contributory negligence was conclusively proven by the evidence in the case: *Claus v. Steamship Co.*, 89 Fed. 646.

The test of the jurisdiction of the Federal Court in a suit to enjoin the further infringement of a trade-mark and for an

**PLEADING AND PRACTICE (Continued).**

**Jurisdiction,** accounting, is the value of the trade-mark to be  
**Federal Court,** protected, and not the amount of damages which  
**Trade-mark** may have been sustained, as decided by the United  
 States Circuit Court, Northern District of California: *Hennesy v. Hermann*, 89 Fed. 669.

It is often interesting to study questions of pleading and practice that differ from any that could arise in one's own state.

**Code Pleading,** The following syllabus is from a case in the  
**"Non est** Supreme Court of Tennessee: Bill in Chancery  
**Factum" to** upon a Note.—Defence was a plea by defendant  
**Promissory** of "*non est factum*," in the code form . . .  
**Note, Issue**  
**Thereon**

"the note was not executed by him, or by any one authorized to bind him." Under direction of the court, issues were made as to whether defendant signed the note himself or authorized it to be signed. Held, that the issues were not equivalent to the plea, since a party by ratification might be held to have executed the instrument which he never signed or authorized to be signed, and estoppel would have prevented his denying it to be his own, though, in fact, it were not: *Furnish v. Burge*, 47 S. W. 1095.

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**PRINCIPAL AND AGENT.**

The importance of care in the preparation of a power of attorney is well shown in *Tyrrell v. O'Connor*, 41 Atl. (N. J.) 674, where it was held that a power to sell bonds did not of itself include the power to bind his principal to convey. The difficulty was, however, cured by the ratification clause of the power, which expressly mentioned sales.

Although the act of an agent be beyond the authority conferred by his principal, yet the principal, by ratifying his act,  
**Ratification** either expressly or impliedly, becomes responsible for it. See *Laudin v. Moorhead Bank*, 77 N. W. (Minn.) 35, where bank was held liable for the proceeds of the sale of plaintiff's wheat, unlawfully sold by its cashier—the bank having received the proceeds.

It is well settled that A, an undisclosed principal, cannot recover from B, the third party, the price of goods sold to B  
**Undisclosed** by C, A's agent, if B, not knowing that C was  
**Principal** acting for A, has in the meantime paid C. *A fortiori*, if C was not A's agent at all, but simply employs A to

## PRINCIPAL AND AGENT (Continued).

fulfill his (C's) contract with B, A has no action against, because no contract with, B: *Carroll v. Benedictine Society*, 41 Atl. (Md.) 784.

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## REAL PROPERTY.

In *Waterworks Co. v. Ry. Co.*, 54 Pac. (Mont.) 963, occurs an exhaustive discussion of the distinction between an easement and a mere license. In this case a town granted a waterworks company a certain right of way through its streets, and afterwards the officers of the town agreed verbally to a change in route. The pipes were laid in accordance with the change of route, and, after more than six years of user, the owners of the property through which the lines ran tore up the pipes, whereupon the water company asked an injunction, claiming an easement in the land. The court held that the company held but a mere parol license, which was revocable though executed, and though its revocation would cause the company great loss. This is the generally accepted doctrine. See *Laurence v. Springer*, 49 N. J. Eq. 289; Jones on Easements, § 70 ff. The rule that an executed license on which a party has acted is irrevocable is adopted in many states—in Pennsylvania, *Resick v. Kern*, 14 S. & R. 267; in Indiana, *Robinson v. Thrailkill*, 110 Ind. 117; in Alabama, *Rhodes v. Otis*, 33 Ala. 578.

The question whether a mortgage covers, or rather how far it covers, subsequently erected fixtures erected on the mortgaged premises by the mortgagor, is one of much importance, and one of its most interesting variations is where the fixtures are erected by a lessee of the mortgagor. *Belvin v. Raleigh Paper Co.*, 31 S. E. (N. C.) 655, is a case of this class, with the not unusual additional complication that, by a provision of the lease, the fixtures were to remain the property of the lessee. Following the modern thought (see *Teaff v. Hewitt*, 1 Ohio St. 511) that the intention of the parties is the main criterion, the court held that such fixtures were not subject to the mortgage, either as against the lessee or his creditors who had retained liens thereon. Montgomery, J., dissented.

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## SURETYSHIP.

The equitable right of contribution between cosureties is subject to any equitable counterclaim, even though that coun-

**SURETYSHIP (Continued).**

<p><b>Contribution, Equitable Counter- Claims</b></p>	<p>ter-claim might not amount to a set-off at law. This is well illustrated when cosurety for payment of corporate note defends upon ground of insolvency of maker and indebtedness of plaintiff to it. While admitting this principle fully in <i>Smith v. Dickinson</i>, 76 N. W. (Wis.) 766, the court held it inapplicable because the defendant had proved that the corporation was insolvent only in the technical sense of not being able to pay its debts as they matured, and not (as was necessary to his case) that upon final accounting it would not be able to pay all of its creditors.</p>
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**WILLS.**

<p><b>Gift to Charity, Validity</b></p>	<p><i>In re Scowcraft</i> [1898], 2 Ch. 638, decides that a gift by the vicar of a parish, by his will, to the vicar for the time being of the parish, of a building to be used as a village club and reading room, "to be maintained for the furtherance of conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing," was a good charitable gift. It was argued that a gift for the furtherance of the political principles of any one party was not for the benefit of the public generally, and was, therefore, not charitable. On the other side it was said that a gift for religious purposes is good, and is not vitiated by being intended to promote particular views: <i>West v. Shuttleworth</i>, 2 M. &amp; K. 684.</p>
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<p><b>Gift on Failure of Issue, Impossibility of Child-bearing</b></p>	<p>In the case of <i>In re Hocking</i> [1898], 2 Ch. 567, the Court of Appeal has decided again that the legal possibility of child-bearing continues up to the moment of death. There it appeared that A, by will, gave all his property to trustees for the children of B and C, his sisters, to be equally divided amongst them on the attainment of twenty-one years by the youngest. And he further provided that should either of them marry and die without children the property was all to go to the other, and he gave his trustees power to make advancements to any child of any part of its prospective share, not exceeding one-third thereof. B had children; C was fifty-four years old and had no children. The trustees applied to know whether the fact of C's being beyond the age of child-bearing ended their discretion as to advancements under the will. It was held that so long as C lived there was, in contemplation of law, a possibility of her having children, and the</p>
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## WILLS (Continued).

trustees' discretion was exercisable up to the time of her death, at which time only the children of A would take a vested interest in the property given to C's children, should she have any. The court followed *In re Lowman* [1895], 2 Ch. 348 and *In re Dawson*, 39 Ch. D. 155. The case of *Jee v. Audley*, 1 Cox, 324, was one dealing with the rule against perpetuities. In that case it was held that a gift over on an indefinite failure of issue of A and B, his wife, it being shown that A and B were both over seventy years old, was nevertheless bad as too remote, for the court refused to consider it legally impossible for these two old persons to have issue.

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SOME RECENT OPINIONS ON PROFIT SHARING AS A TEST OF PARTNERSHIP. It is astonishing to find intelligent judges resting satisfied with the vague and unscientific statements of what constitutes a partnership solemnly made by less intelligent judges and text writers. Take, for example, the opinion of Burgess, J., in *Mackie v. Mott*, 47 S. W. 897 (Supreme Court of Missouri). The court had before it a beautiful case in which to apply the common law principle that only those are partners who are co-proprietors in business, and its corollary that the inference will be against partnership where the facts are consistent with any other relation. The persons alleged to be partners were, in fact, an owner of land and a building contractor, and all the phenomena were consistent with the hypothesis that the owner had tempted the contractor to take up and complete an abandoned building scheme by offering



him a share in the ultimate profits. The court rightly decided that here was no partnership; but one searches the opinion in vain for a clear-cut and intelligible statement of what a partnership is. Theophilus Parsons is quoted to the effect that the question "must generally, and perhaps always, be determined by the intention of the parties." If by this is meant that the parties are partners if they have manifested an intention to become co-proprietors of a common business, each having all the powers and privileges that mark an owner, it is a sound but blind statement of the common law. If (as is more likely) it means that an "intention to become partners" is material to the solution of the problem, it may be disposed of by a reference to the lucid judgment of Sir George Jessel in *Pooley v. Driver*, 5 Ch. D. 458 (1876). Harrison, C. J., in *Gates v. Johnson*, 77 N. W. 407, is apparently satisfied with the familiar and well-nigh meaningless phrase to the effect that partnership exists where there is "a community of interest in a business enterprise and in the profits thereof." In pleasing contrast to these views is the recognition given by Temple, J., to *Cox v. Hickman*, 8 H. L. C. 268 (1868), and *Eastman v. Clark*, 53 N. H. 276 (1876), and the true theory of partnership which those cases expound; *Coward v. Clanton*, 55 Pac. 147. He denies that the California Code makes profit sharing the test of partnership. He observes that the code definition would not lack much of a good definition of a partnership if the clause in regard to a division of profits were omitted. It would read: "Partnership is the association of two or more persons for the purpose of carrying on business together." He is right. Insert the words "*as co-proprietors*" after the word "persons," and the definition accurately describes the relation. Failure to grasp the full significance of this test has just led the Supreme Court of North Carolina (*Webb v. Hicks*, 31 S. E. 479) to render a decision, which appears, though the report of the facts is meagre, to declare that a partnership exists upon the same state of facts which was held in *Cox v. Hickman* not to constitute the relation. Creditors of an insolvent arranged with the assignee to run the business in order to work out their debts. Obviously this is not a case of association for the purpose of business, but co-operation in saving planks from the wreck. Compare *Kilshaw v. Jukes*, 3 B. & S. 847 (1863). The North Carolina court does not even cite *Cox v. Hickman*, nor does it refer to the well-known New Jersey case of *Brundred v. Muzzy*, 25 N. J. Law, 268; Id. 674 (1857), which would have been directly in point. A much more satisfactory opinion is that of Dixon, J., in *Austin v. Neil*, 41 Atl. 834, in which case the Supreme Court of New Jersey applies the test of principalship or proprietorship, and reaches the conclusion that the real relation between the persons alleged to be partners was that of lessor and lessee.

OLEOMARGARINE ; CONSTITUTIONALITY OF STATE LAWS REGULATING ITS MANUFACTURE AND SALE. In recent years a number of states have attempted to prohibit the sale of oleomargarine within their borders. Owing to the vast amount of capital invested in the manufacture of this substance, as opposed to the wealthy dairy interests, which are inimical, as a matter of course, to its use by the public, the statutes upon this subject have been bitterly contested, and there is no slight probability of a further development of this question by the courts. The latest decision upon it is the case of *Wright v. State*, 41 Atl. 795 (Nov. 17, 1898), in which the Court of Appeals of Maryland affirmed the constitutionality of the statute of that state set forth below.

The following statutes have been attacked as violating provisions of the Constitution of the United States :

Maryland Act of Assembly, Cod. Publ. Laws, Art. 27, Sec. 88 (1888) : " No person shall manufacture out of any oleaginous substance other than that produced from unadulterated milk, or of cream from the same, . . . any article designed to take the place of butter or cheese, . . . or shall sell or offer the same for sale as an article of food." Section 89 prohibits the manufacture or sale of such article, "*whether such article is made or produced in this state or elsewhere.*"

Pennsylvania Act of Assembly, May 21, 1885, P. L. 22, was substantially similar to the Maryland Act, except that the clause in italics was omitted.

Massachusetts Statutes, 1891, c. 58, p. 695, prohibited the sale of the aforesaid "article in imitation or butter. . . . " *Provided*, that nothing in this act shall be construed to prohibit the manufacture and sale of oleomargarine in a separate and distinct form, *and in such manner as shall advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.*"

New Hampshire Publ. Stat., 1891, c. 127, § 19, prohibited the sale of oleomargarine, "unless the same is contained in tubs, firkins, etc., marked 'oleomargarine,' . . . and, if it is a substitute for butter, *unless it is of a pink color.*"

The three last statutes have been brought before the Supreme Court of the United States on the ground that they were in conflict with the Fourteenth Amendment and the Commerce Clause. In *Powell v. Pennsylvania*, 127 U. S. 678 (1888), defendant was indicted for selling in Pennsylvania a package of oleomargarine manufactured in that state. The Supreme Court affirmed the decision of the Supreme Court of Pennsylvania, holding that, as to oleomargarine manufactured within the state, the Act of 1885 was a valid exercise of the police power, and not in conflict with the Fourteenth Amendment. Justice Gray dissented, and the closing words of his opinion are significant : "The prohibition of sale in any way, or for any use, is quite a different thing from a regulation of the sale or use so as to protect the health and morals of the

community. The fault which I find with the opinion of the court on this head is that it ignores the distinction between regulation and prohibition."

Next in order the Massachusetts statute was called into question. In *Plumley v. Massachusetts*, 155 U. S. 493 (1894), defendant was indicted for selling in Massachusetts an original package of oleomargarine manufactured in Illinois. The court held that, even though the law acted on a subject of interstate commerce, yet its plain effect was merely the prevention of deception and fraud on the public, and it was, therefore, valid under the police power. Fuller, C. J., Field and Brewer, JJ., dissented on the ground that the statute prevented the sale of oleomargarine when of a color similar to butter, even though there might have been no intention on the part of the seller to deceive the public into the belief that it was butter. "I deny that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities." (Per Fuller, diss.).

Last year the Pennsylvania and New Hampshire statutes came before the court, this time the question of interstate commerce being involved in their application. In *Schollenberger v. Pennsylvania*, 18 Sup. Ct. 757 (1898), the Supreme Court of the United States held the Pennsylvania statute void as a regulation of interstate commerce when it acted upon original packages of oleomargarine brought from other states. The opinion of the court, delivered by Justice Peckham, is a work of exceptional learning and ability. After considering the nature and history of oleomargarine, he comes to the conclusion that, within the past quarter of a century, oleomargarine has ceased to be a "newly discovered product," which a state legislature might well prohibit on the ground that it might be dangerous to the public, but that it is a "perfectly healthful commodity" and a "nutritious article of food." Therefore, the state may not prohibit the introduction of the said nutritious food within her borders; and it is useless for her legislature to declare that the health of the inhabitants may be harmed thereby, since the question as to the nature and effect of oleomargarine is to be decided by the court and not by the legislature. From this decision Justices Gray and Harlan emphatically dissented. They denied that even at this date a court has power to say that, as regards a substance of the nature of oleomargarine, the legislature has erred when it solemnly declares its introduction into the state to be a danger to the health of the community, and the statute to be necessary to protect the people from being induced to purchase articles either not fit for food, or differing in nature from what they purport to be; but that "the questions of danger to health, and of likelihood of fraud or deception, and of the preventive measures required for the protection of the people, are questions of fact and of public policy, the determination of which belongs to the legislative department and not to the judiciary."

At the same session of the court the New Hampshire statute was declared unconstitutional: *Collins v. New Hampshire*, 18 Sup. Ct. 768 (1898), Gray and Harlan, JJ., dissenting. Justice Peckham, in delivering the opinion of the court, said that, if a legislature had power to cause oleomargarine to be colored pink, they could order it to be colored in such a repulsive manner and mixed with substances so offensive to the senses that, although it might not be deleterious to the health, the public would be effectually restrained from purchasing it; therefore the statute was as bad as the one which the court had just declared void in *Schollenberger v. Pennsylvania*.

The question naturally arises whether, in the cases of *Schollenberger v. Pennsylvania* and *Collins v. New Hampshire*, the Supreme Court does not overrule its decisions in *Powell v. Pennsylvania* and *Plumley v. Massachusetts*. Justice Peckham says that it does not; Justice Gray says that it does. Certainly, it would seem that, at the very least, the court has taken a new position on the subject. According to the position of the majority in *Schollenberger v. Pennsylvania*, oleomargarine, when properly manufactured, is a healthful and nutritious article of food and a well-known and harmless commodity. Now, it is very proper to say that such an article may not be excluded by a state from interstate commerce, or its interstate transportation even regulated; but it is quite consistent for the court so say, in the same breath, that the legislature of Pennsylvania may utterly prohibit the manufacture and sale of this healthful food product within the state? Yet this was so adjudged in *Powell v. Pennsylvania*, for the Pennsylvania statute prohibited the sale of oleomargarine *without any exceptions whatever*, and it was admitted in that case that the purchaser was fully aware of what he was buying. If the premise adopted by the majority in *Schollenberger v. Pennsylvania* is correct, the conclusion is irresistible that the rights of the inhabitants of Pennsylvania to manufacture and sell this "healthy food product" are secured under the Fourteenth Amendment.

To return to the Maryland case, *Wright v. State*, 41 Atl. 795, it would seem that, under *Powell v. Pennsylvania*, the case was correctly decided, since its facts did not admit of the application of the commerce clause, the transaction being confined to oleomargarine manufactured and sold within the State of Maryland. If, however, defendant should take an appeal to the Supreme Court of the United States, there is, at least, a possibility that he would be able to secure a reversal.

## BOOK REVIEWS.

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THE LAW OF BANKRUPTCY AND THE NATIONAL BANKRUPTCY ACT OF 1898. By WM. MILLER COLLIER. Albany: Matthew Bender. 1898.

There are probably only two ways in which the new bankruptcy law can be successfully treated: the one is a publication of the text, with marginal notes (as the pamphlet just published by Washington Law Book Co.), and the other and more ambitious method, which is adopted by Collier, includes also the various sections of the act in arithmetical order, but so interspersed with explanations, comparisons with the older legislation and citations from the decisions thereunder, as to entitle it to the name of text book. The work, which modestly claims for itself the privilege of hewing a path through the intricacies of the law, is likely, however, owing to the skillful execution of the plan, to find a place at the elbow of the practitioner after the way has been well cleared. Features of it which deserve special mention are: The cross references at the close of each section to the correlative sections in *pari materia*; the practice of giving all the reports where the various bankruptcy decisions may be found—which will be found helpful by those who do not possess N. B. R.—and the very full comparison of the various sections with the corresponding sections of the preceding acts—which will, doubtless, enable the reader to avoid some of the numerous pitfalls into which an apparent similarity between the statutes might easily lead him. The important new questions are broached by the author—as to widow's dower, on page 91, and "debts created by misappropriation," on pages 175, *et seq.*; and he seems to have on occasions, as for instance in section 10, on "Extradition of Bankrupts," refrained from deciding how the law should be interpreted, without, however, where the authorities are conflicting, hesitating to indicate the preferable rule, as in the note on "Rights of Action Upon Provable Claims," on pages 10, *et seq.*; "Attachment Bonds," on pages 149, *et seq.* Particularly suggestive is his essay (for it really deserves that name) on "Date of Transfer," on pages 309, *et seq.* The treatment seems to be well sustained in spite of occasional sections, which are hardly adequately treated, as § 29, on Offences, §§ 38–9, 50 and 64. As appendices are printed: (1) The Act of 1867, which should prove useful; (2) The exemption laws of the various states, which are, perhaps, hardly worth the space they take; and (3) a set of forms, whose usefulness is limited by the fact that they may be superseded at any time by the Supreme Court. On the whole, however, it may be fairly said, both that there was a distinct opportunity for such a work and the opportunity has been realized by the author.

R. D. B.

**ELEMENTARY LAW.** By WILLIAM C. ROBINSON, LL. D., Professor of Elementary Law in Yale College. Boston: Little, Brown & Co.

Mr. Robinson's volume on Elementary Law is intended, as he states in the preface, to serve as a text-book for the use of students in law schools, to guide private students in their initial research for legal principles and definitions, and to familiarize students in general with some of the leading treatises on jurisprudence. The author has followed Blackstone's Commentaries in the sub-division of the book and the treatment of the subject. The definitions are given in clear, precise terms, freed from all legal and technical verbiage. Copious references are made to noted writers and commentators, to assist the student in his subsequent investigations. The explanation of the usually difficult subject of Uses on pages 42 and 43 is so lucid that it may be readily understood by the beginner. The work is supplemented by a table of reference and a duplicate index. The definition of conspiracy on page 141 would be more complete if the words "or a lawful act in an unlawful manner" were interposed. With this and a few other minor errors corrected, the work will prove an invaluable aid to students just beginning their legal studies.

P. V. C.

**SUMMARY OF TITLE TO PERSONAL PROPERTY.** By CHARLES A. GRAVES, Professor of Common Law in Washington and Lee University. Lynchburg, Va.: John P. Bell Company. 1897.

In his little volume of eighty-seven pages, containing three chapters, Professor Graves has given some things in a brief way that may be helpful to both student and practitioner. As suggested in the prefatory note, the volume should be studied in connection with a work of illustrative cases.

While it may be claiming too much to expect that more than two hundred and seventy-five cases should be cited in a treatise of less than one hundred pages, yet it does seem that some portions of the book are well worth being supported by more leading cases—as, for instance, those parts of the volume dealing with gifts *inter vivos* and gifts *causa mortis*. Then, too, it would seem much better to have the dates given of all authorities cited.

One misses any reference to the Statute of Frauds, and the brief mention of title to lost negotiable instruments, stolen chattels and unclaimed goods is hardly satisfactory. However, a careful reading of the seventy-five pages devoted to the three chapters—Title by Original Acquisition, Title by Gift, and Title by Sale—will convince anyone that the author has his subject well in hand, and has clearly said what he intends the reader to get from his book.

W. C. J.



**A DIGEST OF THE LAW OF EVIDENCE.** By SIR JAMES FITZJAMES STEPHEN. Second American Edition, from the Sixth English Edition, with Annotations and References to American Cases. By GEORGE CHASE, LL. B. New York. 1898.

The second American edition of Stephen's important work on Evidence incorporates such amplifications and changes in the text as were made by the author in the last English edition, which was published before his death. In the preface to this sixth English edition Stephen stated that the Law of Evidence had hardly been altered at all since the book had been first published. Cases had been decided, however, and statutes passed; and, to include mention of these, the successive editions had been prepared.

A similar justification is found for the second American edition. In the twelve years since its predecessor appeared, several thousands of cases bearing on the subject of Evidence have been reported in America. These have been carefully examined and are extensively cited in the notes, so as to exhibit the law in its latest developments. Many new illustrations have been added, and the annotations which set forth the American law have been thoroughly revised and largely rewritten. Some of the topics have thus received fuller treatment than was given them before. In other minor respects this second edition marks an improvement over the first, and it will doubtless gain a welcome from the profession.

*J. J. S.*

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**THE NEGOTIABLE INSTRUMENTS LAW.** Annotated. By J. WARNER MILLS. Denver, Colo.: Mills Publishing Company. 1897.

"The Negotiable Instruments Laws" of Colorado (Colorado Session Laws, 1897, Chapter 64, pages 210-248), have been digested and annotated by Mr. J. Warner Mills. The work is on the same general plan as is used in the various digests of the state laws, though more complete. The book is of 150 pages, and is of value only to the Colorado bar.

*J. F. B. A.*

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**THE LAW ON RAILWAY ACCIDENTS IN MASSACHUSETTS.** By G. HAY, Jr. Boston: Little, Brown & Co. 1897.

The author, in this case, has succeeded admirably in treating a subject which has already been extensively written upon and exhaustively considered. We end a perusal of his single volume with the wish that Mr. Hay, instead of restricting his scholarly treatise to the law of Massachusetts, had made it a general text-book. The discussion of the subject has been with bolder originality than one would think possible without making the law suffer, but in no case has it resulted in other than a felicitous exposition, which, from

the time the author settles upon his leading thought of "physical integrity" until he finishes his discussion of the most recent Massachusetts statute, is especially noticeable. The analysis of the subject is worthy of note, together with the logical methods which have been used in arrangement. The chapters usually start with some well-established rule, and lead, by the most natural steps, into the very heart of the subject.

Some 700 cases are collected and are cited in the body of the text instead of by foot-notes, and this at times so cuts the text up that it is found unpleasant. The book is chiefly of value to the practitioner and student of the one state only; and aside from its logical arrangement and orderly grouping of the parts, so that the main object is constantly kept before the reader's eyes, it is, owing to its limited scope of treatment, not likely to be widely read. But, in all justice to the author, we must bear in mind that he has thoroughly covered the ground that he started out to accomplish.

*T. C.*

**SUPPLEMENT TO NOTES ON THE REVISED STATUTES OF THE UNITED STATES AND THE SUBSEQUENT LEGISLATION OF CONGRESS, JULY 1, 1889, JANUARY 1, 1898. By JOHN M. GOULD and GEORGE F. TUCKER. Boston: Little, Brown & Co. 1898.**

In 1889 appeared the well-known volume of Messrs. Gould and Tucker, entitled "Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress." A supplement of some six hundred and fifty pages now brings the work down to January 1, 1898. The purpose of the notes and the supplement cannot be better shown than by an extract from the preface to the original volume: "The aim has been to show all changes made by the revision of 1874 in the previous laws, and all statutory changes and additions since made down to and including the legislation of the Fiftieth Congress, together with the result of all material decisions of the Federal and state courts relating to the constitutionality, repeal, modification and construction of these, the supreme law of the land."

In the supplement, which includes the later statutes through the first session of the Fifty-fifth Congress, the arrangement of the previous volume is followed. The notes are classified in accordance with the numbering of the titles and sections of the Revised Statutes. In many instances the new statute is inserted in full. The notes of judicial decisions are remarkably concise. The authors, throughout the book, have used rare judgment in condensing a great mass of information within a reasonable compass. Every page gives evidence of careful editing. Messrs. Gould and Tucker have placed the bar at large under renewed obligations by bringing down to date a standard work of wide usefulness.

*T. S. W.*



## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**A COMPENDIUM OF INSANITY.** By JOHN B. CHAPIN, M.D., LL.D.  
Physician-in-chief, Pennsylvania Hospital for the Insane ; illustrated.  
Philadelphia : W. B. Saunders. 1898.

**THE LIFE OF DAVID DUDLEY FIELD.** By HENRY M. FIELD. New  
York : Charles Scribner's Sons. 1898.

**PRINCIPLES OF CONSTITUTIONAL LAW.** By THOMAS M. COOLEY.  
Boston : Little, Brown & Co. 1898.

**COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.** By PRENTICE  
& EGAN. Chicago : Callaghan & Co. 1898.

**A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE.** By JAMES  
BRADLEY THAYER, LL.D. Boston : Little, Brown & Co. 1898.

**BOUVIER'S LAW DICTIONARY.** Revised by FRANCES RAWLE, ESQ.  
Vol. II. Boston : Boston Book Co. 1898.

**THE UNITED STATES INTERNAL REVENUE LAW.** By MARK and  
WILLIAM ASH. New York : Baker, Voorhis & Co. 1898.

**THE LAW OF BUILDING AND LOAN ASSOCIATIONS.** By WILLIAM W.  
THORTON and FRANK H. BLACKLEDGE. Albany : Matthew Bender  
& Co. 1898.

**A TREATISE ON THE LAW OF MONOPOLIES AND TRUSTS.** By CHARLES  
FISK BEACH, SR. St. Louis : Central Law Journal Co. 1898.

**THE LAW OF BANKRUPTCY.** By EDWIN C. BRANDENBURG. Chicago :  
Callaghan & Co. 1898.

**THE LAW OF TRADE AND LABOR COMBINATIONS.** By FREDERICK H.  
COOKE. Chicago : Callaghan & Co. 1898.

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## AN INQUIRY INTO THE NATURE AND LAW OF CORPORATIONS—PART III.

### *The Relations Between a Stock Corporation, its Directors, Stock- holders and Third Persons.*

Assuming the corporation to be properly organized and administered, these relations would seem to be very simple and completely determined by our previous discussion. A corporation we have found to consist of the persons authorized to act in its name, that is to say, in the case of a stock company, for almost all purposes, of the directors. It therefore follows, in the absence of special statutes, that in the directors are vested all the powers of the corporation, and that they exercise them, not as the agents of the stockholders as ordinarily assumed, but as principals, from which it further follows that, so long as the directors act in good faith for corporate purposes, they are subject to no control and need no special authority from stockholders or others. But since, like trustees, they are natural persons, exercising the powers and administering the assets of an artificial person for the benefit of third

persons (the stockholders), they, like trustees, may be enjoined from acting in fraud of the corporation or from otherwise wasting its assets. The stockholders, as contributors and ultimate owners of the corporate funds, contributed only to be used in good faith for corporate purposes, have the right to see that such funds are so applied, and to that end have standing in court. If the funds have already been wasted, the situation is a little more difficult; since, although the corporation plainly possesses the right to sue the directors on account of their fraudulent acts, yet as a corporation consists of the directors, such remedy would seem to be insufficient. The courts, however, to meet this difficulty, properly allow in such cases the stockholders to institute proceedings in the name of the corporation. Excepting, however, this right to proceed against the directors in cases of fraud or waste, the stockholders would seem logically to have no rights as regards the directors except those granted by the statute or reserved in the charter, such, for instance, as the right to elect or remove directors, to authorize mortgages, to amend the charter, to dissolve the corporation, etc., or any liability to third persons except such stockholders' liability as may be imposed by the statute. The relations between the corporation itself and third persons should be even more simple. A corporation existing in the law as an artificial person, the subject of the general property rights, the dealings of third persons with it, should be governed by the common law applicable to like dealings between natural persons, such third persons being in nowise concerned with the various relations between the corporation, its directors and stockholders. But, as a matter of fact, the law governing the dealings between third persons and corporations has been much perverted by the establishment of the doctrine known as "*ultra vires*," according to which a corporation possesses only those powers especially conferred by the charter or necessarily incident to the corporate purpose; any acts not founded on such powers being held *ultra vires* and void.

This doctrine cannot be said to be satisfactorily established, for so contrary is it both to the nature of a corporation and

the rights of third persons dealing therewith, that the courts have never been able to enforce it to its furthest extent. The courts have never gone to the logical length of holding a contract executed on both sides voidable on the part of the corporation, thus enabling the latter to recover any consideration it may have given on account thereof; but they have sometimes held contracts executed by third persons voidable by the corporation, thus enabling the corporation, while retaining the benefit, to withhold the consideration. To conceal this conflict between the justice and the supposed necessity of the case, the courts have created the fiction that all persons dealing with a corporation do so with full knowledge of the extent and limitation of its corporate powers, and that, therefore, there is no such thing as an innocent party to an *ultra vires* contract—a fiction founded on a recognized principle of public policy in a case of public corporations, but which cannot be maintained in the case of private corporations, in the face of the well-known fact that not one person out of a hundred dealing therewith has any knowledge of the corporate charter. Private corporations are innumerable, and they do business all over the commercial world without reference to the State of their creation, and it is in the nature of the case impossible that the public should be informed as to the provisions of their various charters. This extraordinary doctrine, having its origin in a total misconception of the true nature of a corporation, is bolstered up through the confusing by the courts of acts *ultra vires* with acts contrary to public policy, and the acts of private with the acts of public corporations. The law of corporations has no special concern with the doctrine of law declaring contracts contrary to public policy void, as this latter doctrine is but the general law of the land, applicable alike to artificial and natural persons; and yet the courts, and especially the Supreme Court of the United States, in passing upon cases in which corporations, and especially quasi-public corporations, such as railways, have entered into contracts contrary to public policy, have based their decisions, properly holding such contracts void, upon the lack of power of the corporations to make them, rather than upon the in-

herent illegality of the contracts themselves. Take, for instance, the leading case of *The Central Transportation Company v. The Pullman Car Company*.<sup>1</sup> Here a quasi-public corporation, the Central Transportation Company of Pennsylvania, chartered for the transportation of passengers, etc., entered into a contract with the Pullman Palace Car Company of Illinois, agreeing, among other things, "not to engage in the business of manufacturing, using or hiring sleeping cars," thus in effect abandoning the duty which it owed the public. This contract, therefore, was void as contrary to public policy, and the Supreme Court, in deciding the case, so finds, but, nevertheless, rests its decision upon the general doctrine of *ultra vires* applicable to all corporations and all contracts, rather than upon the special circumstances of the case. It will be noted, in reading the opinion, that almost, if not all, the cases cited are either cases of like failure upon the part of quasi-public corporations to discharge their duty to the public, or are cases of *ultra vires* acts on the part of cities; yet all such cases are cited, as if the doctrine therein laid down was applicable to all corporations. But even in this case the court gives a proper definition of *ultra vires* contracts in the statement that they are such contracts as are "outside the object of its (the corporation's) creation as defined by the law of its organization," but, unfortunately, immediately draws the erroneous deduction that they are "therefore beyond the power conferred upon it by the legislature;" and then goes on to state that "the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it," although it is perfectly plain that the only objection to the contract in question in that case was that, for public reasons, the corporation ought not to have made it. This case, one of the leading cases in this country on the subject, shows very plainly the reason which has led the courts to establish this *ultra vires* doctrine upon an erroneous basis. The courts have entirely failed to distinguish between what corporations ought not to do and what they have not the

<sup>1</sup> 139 U. S. 24, 59.

power to do. There are evidently many things that a corporation should not do as being outside the purpose for which its capital was contributed by the stockholders, although entirely within the powers of the corporation as a person existing in the law. Of course, if the purpose of the contract be contrary to public policy, then, as in the case above cited, such contract is for such reason void, or if a municipal corporation enter into a contract outside the purpose of its organization, such contract is evidently voidable on the general ground that such corporations are not bound by the unauthorized acts of their agents. But such doctrine is not applicable to private corporation, and, therefore, plainly such corporations should be bound by all acts of the directors or corporate agents within the corporate powers, whether within the purpose of corporate organization or not. What these powers are, our previous inquiry has already determined. A corporation is an artificial person, existing in the law as the subject of the general property rights, and, therefore, subject, of course, to the right of the State to limit or enlarge them, is possessed of all the common law powers incident thereto. A corporation possesses the power to buy, to sell and to hold real and personal property, to borrow and repay money, to employ labor, to enter into contracts, etc., and, therefore, any act done or contract entered into by it in the exercise of any of such powers, is binding upon it, although such act or contract does not conduce to the purpose for which the corporation is organized. In such latter case we have found that the stockholders have a right to enjoin such action on the part of the corporation; but, nevertheless, if such act has been performed, or such contract entered into with an innocent third person without knowledge on his part of the improper purpose thereof, such corporation should evidently be bound thereby. The powers of persons at common law are simple and not complex (the right of purchase is a general abstract right and does not consist in the right to purchase one thing rather than another, or for one purpose rather than another), and of such nature also should the courts hold the powers of corporations.

The absurdity of treating the powers of a corporation as limited by its purposes is well illustrated by the case of *The Fort Worth City Co. v. The South Bridge Co.*<sup>1</sup> In this case a land company, although not vested by its charter with any special power to that end, contracted with a bridge company for the purchase of a bridge to be used on a public highway leading to the property which the land company was developing. At the suit of the bridge company for the contract price of the bridge, the land company, among other defences, alleged that the contract was beyond the special powers conferred on it by its charter and was, therefore, null and void. The court, Chief Justice Fuller, controlled it may be assumed by the requirements of justice, properly held the land company liable, but only upon the finding of fact that the construction of such bridge was one of the desirable means of developing the property held by it; leaving it to be inferred as, indeed, the doctrine of *ultra vires* would require, that if the construction of such bridge has not, as a matter of fact, been a proper means to that end, as to which fact the land company had full knowledge and the bridge company none at all, the bridge company and not the land company would have had to sustain the loss resulting from the building of a useless bridge. Plainly, in this case, the court should not have concerned itself with the question of the utility of the bridge, but should have held the land company liable upon the ground that the corporation possessing the power of purchase and having ordered the bridge, was liable to pay therefor, irrespective of the use to which it was put. Of course, however, should a corporation enter into an improper contract with a party having knowledge thereof, such contract should not be enforced, for in such case such party would be a party to the fraud on the corporation and fraud vitiates all contracts. But such knowledge, as in other cases of fraud, should be found as a fact and not presumed as a matter of law, although in many cases, as if, for instance, a charitable institution speculated through a broker, such knowledge might well be inferred

<sup>1</sup> 151 U. S. 294.

as a fact from the circumstances of the case. Even, indeed, if a corporation should be deprived by its charter of any general power, as, for instance, of the power to take or hold land, in the absence of any general law or public policy controlling the matter, persons dealing with such corporation should have the right to assume that it was not an exception to the rule, but that it was vested with the general property rights, and, therefore, in the absence of any special knowledge, such persons should be allowed to hold the corporation responsible for its *ultra vires* acts. On the contrary, however, it is equally true that if the powers of any special class of corporations, such as national banks for instance, are limited by general laws, such limitations, in accordance with the established doctrine of the common law, are binding on all persons. But the same considerations and the same corporate theory which should thus protect innocent persons against loss through the wrongful acts of persons composing a corporation, demand that such persons acting thus wrongfully should be held accountable to the corporation itself. It does not follow, however, that they should be held accountable for mere mistakes of judgment as to what acts do or do not serve the corporate purpose, but only when the corporate assets are wasted through their negligence or bad faith. This question of the responsibility of the directors of a corporation for their wrongful acts is often further complicated by the assent thereto of a number or all of the stockholders. It is clear that if every stockholder assented, they and through them the corporation, should be estopped from recovery, but it seems equally clear that any one innocent stockholder should have the right through the corporation to proceed against the directors, leaving the directors to whatever action they might have against their co-directors or assenting stockholders. To be sure, it would seem that the general doctrine that joint tortfeasors cannot enforce contribution against each other, would prevent such directors as were originally compelled to make good to the corporation the loss resulting from their wrongful acts, from recovering anything from their co-directors or from the stockholders participating therein, but the same public



policy which is the basis of the doctrine above mentioned, certainly sustains this application thereof. The knowledge on the part of the directors that, irrespective of the assent of even a majority of the stockholders, they will be held personally liable to the corporation for any loss it may sustain through their wrongful acts, will tend strongly to restrain them in the exercise of their trust.

All this proceeds on the assumption that a corporation is incorporated and organized in accordance with law ; otherwise different questions arise. But such questions are easily determined if the proper nature of a corporation is born in mind. Take first the case of a body of men assuming to act as a corporation without authority of law. It is perfectly plain that if such persons so act without even a *bona fide* attempt to comply with the corporate law or for a purpose that is contrary to public policy, then their action is neither more nor less than a fraud upon the State, and they should not be permitted to screen themselves behind the corporate name, but should be held to their common law liability as individuals. But return to our definition, we see that the persons to whom the above statement applies are not the stockholders but the directors, since it is the latter, and not the former, who are empowered to assume to act under the corporate name ; the stockholders, like the public, having been deceived, the latter into dealing with a fraudulent corporation, the former into subscribing for its stock. While the directors should, therefore, be held personally responsible to both the public and to the stockholders for any damages suffered by them through the fraudulent corporation, under no principle of law can innocent stockholders be held responsible therefor. As already found, in no sense are the directors the agents of either the corporation or of the stockholders, and therefore the stockholders, even of an illegal corporation, cannot be said to have authorized the directors to act as their agents. Nor can they be held liable as partners fraudulently doing business under the corporate name, for as already found it is the directors and not the stockholders who occupy such position. The stockholders are not partners in fact since such is not the contract

between them, nor should they be presumed to be such in law in the absence of any authority or right, apparent or real, on the part of any one of them to act on their joint behalf. As already said, it is the directors who hold themselves out to the public as authorized to act in the corporate name, and it is therefore they and not the stockholders who, if the corporation be non-existent, should be presumed in law to be partners. Yet the above considerations do not seem to go to the extent of relieving the stockholder from liability upon their stock subscriptions, for, although they have not in anywise constituted the directors their agents to conduct a commercial enterprise for them as principals, nevertheless they certainly have entrusted them with funds to be applied to such purpose, and their rights, therefore, should be subordinate to those of the creditors to whom such funds have been equitable pledged by way of carrying on such enterprise. As against the corporation and its directors, the stockholders should be permitted to disaffirm a contract of subscription entered into under a mistake of fact provided such disaffirmance is made promptly upon the discovery of such mistake; but as regards the public, who have dealt with such alleged corporation, relying upon the funds contributed or subscribed to it by the stockholders, the latter should be estopped from setting up the illegality of such stock subscriptions in defence of any action that might be brought against them or the corporation for or on behalf of innocent creditors. As regards the status of such pretended corporation itself, having no legal existence, no proceedings in the nature of *quo warranto* by the State are necessary to dissolve it, but its affairs will be wound up by a court of equity at the instance of any person interested in its affairs, or its non-existence may be set up by any third person in defence of any action brought in its name. But it does not follow from this that persons who, in their dealings with such pretended corporation have obtained possession of moneys or other properties properly belonging to the persons acting under such corporate name, should be permitted to maintain possession thereof as against these latter persons. On the contrary, under the general legal principle which holds all persons responsible for all moneys or

other properties coming into their possession which properly belong to another, they should be held liable therefor at the suit of such pretended incorporators as individuals.

So much for the case where the corporators cannot be said to be acting in good faith, but evidently where such corporators are acting in good faith and for a proper purpose, although having failed to comply with some provision of the statute authorizing the formation of the corporation, then other considerations apply, and in the absence of any special damage to any persons there would seem to be no reason why the courts, in order to maintain the rights of all persons concerned, should not hold all persons except the State estopped from denying the legal existence of the corporation. Although corporations were and are, as already seen, illegal at common law, yet the State having, through its legislation, recognized the policy of permitting persons to carry on certain commercial enterprises as an artificial person under an assumed name, the courts, certainly, in furtherance of such policy, may, when public convenience, equity and justice alike require it, recognize persons as a corporation who are in good faith acting as such for a legal purpose; and so the courts have done, and treat such pretended corporations as corporations *de facto* although not *de jure*. A corporation *de facto* may, therefore, be defined as the artificial person existing in contemplation of law by virtue of the *bona fide* undertaking by various persons to act as a corporation in accordance with the law and policy of the State.

A still different condition of affairs results when a corporation, although properly incorporated, undertakes to transact business without the capital required by its charter. The State, in creating a stock corporation, but confers upon various individuals the power to carry on a commercial enterprise under an assumed name by means of a fixed capital divided into transferable shares. The amount of capital is set forth in the charter that persons dealing with the corporation may have knowledge of its financial standing, that irresponsible companies may not masquerade as responsible concerns, that corporations should not be mere frauds and shams by which

individuals should be enabled to avoid their common law responsibilities and defraud the public. If, however, the legal requirement expends itself when the corporation declares a nominal capital, not demanding that such capital should actually exist as a condition precedent to the prosecution of the business, then it becomes but an additional snare and trap for the public deceived by such statement. Better that the corporation should not declare its capital, that the public should have no information with regard thereto and should knowingly deal therewith at its peril, than that it should be misinformed, that it should be lead to believe that a corporation possessed a large capital, when in reality it might possess little or none. The State, in fixing the capital or in requiring it to be publicly fixed, plainly makes the acquirement of such capital a condition precedent to the transaction of business, if not, indeed, to the very existence of the corporation itself. The State but authorizes the corporators to carry on a certain commercial enterprise under the corporate name by means of the capital stated ; unless therefore provided with such capital, the corporators act at their own risk and without authority, and should not be permitted to screen themselves behind a charter with the most important provision of which they have failed to comply, but should be held to their individual common law liability.

But, as has already been found in the case of persons assuming to act as a corporation without authority of law, it is the directors not the stockholders who so act, and who, therefore, should be held responsible personally as partners therefor. The stockholders, like the public, may be assumed to be deceived by the directors, and there would seem to be no equity in holding them personally liable, not for their own, but for the directors' acts, except, as already found, to the extent to which they may have agreed to contribute to the corporate capital. And, indeed, this is recognized by the court, and in some States such limitations are even imposed by statute, while at the same time the courts have gone very far in holding such stockholders liable to the full par value of the stock taken by them, properly holding that the amount payable therefor is in

the nature of a trust fund, pledged for payment of the corporate obligations. Evidently, however, the creditors are entitled to something more than this limited right of redress against the stockholders, when they have been injured by the action of the *directors* in conducting the business of the corporation before the legal requirements as to capital have been by them complied with. If all the stock has not been subscribed, the full payment of all the subscriptions will not furnish the corporation with as large a fund applicable to the payment of its debts as the law requires, and which the creditors, therefore, have the right to demand; while if some of the stock has been subscribed for by irresponsible persons, the creditors should evidently not be put to the expense, delay and difficulty of pursuing the individual stockholders, nor be compelled to take the risk of any failure to collect from any such the par value of his stock.

But the matter needs no further discussion, since plainly the directors having, without complying with a condition precedent thereto, undertaken the prosecution of the business of the corporation to the resulting loss and injury of third persons, are and should be held, legally and equitably, personally responsible to them for such unauthorized act. It would not, indeed, seem extreme, under such circumstances, to deny the directors the right to set up their corporate capacity in defence of any action brought against them personally, and thus hold them responsible for all the debts of the corporation; but the demands of justice would seem to be met if they were compelled to make good to the corporation and its creditors the fund without which they had no right to transact business in a corporate capacity. The same reasoning applies to the case where the stock of the corporation has been all subscribed for and issued as full paid, when in fact the consideration therefor was not cash, but either of a nominal character or consisted of rights and properties of less than such par value. In such case, unless such issue for other than cash is authorized by law, the same is illegal and must be held to be at the risk of the directors who so issue, and of the stockholders who so pay their subscriptions; and, therefore, unless said

property realizes to the corporation in cash the full par value of the stock issued therefor, such directors should be held liable for the entire deficit, and each stockholder for the balance of his subscription, at the suit of the corporation or of any creditor. If, however, such issue for other than cash is authorized by statute, and such statute has been in all respects complied with, and such property has been in good faith given and accepted as of the full par value of and in full payment for the stock issued, no liability would arise on the part of anyone, even though such property is subsequently found to be inadequate in value; while on the contrary, if the statute has been evaded or the property knowingly overvalued, this constitutes a fraud invalidating the entire transaction, wherefore the directors, as before, should be held personally responsible to the creditors to the extent of the authorized capital, and such stockholders who have received their stock for less than its par value should be held responsible for the unpaid portion of their subscription. The authorities properly hold that the question in such case is one of good faith.

The law as stated above, and especially the doctrine of the primary liability of directors, would seem to be the necessary consequence of the nature of corporations as disclosed. The courts, however, do not recognize such personal liability on the part of the directors, and it is not law. Both the Bench and Bar have been misled by the assumption that the persons authorized to act as a corporation are thereby constituted not the corporation but its agents, and by the further assumption that if any persons could be said to be the corporation, they were the stockholders and not the directors. Having put the directors in the possession of mere agents, the courts have been unable to hold them to that primary and personal responsibility which is properly theirs, and which equity and justice demand should be imposed upon them. Yet, although released at law, it is the directors and not the stockholders who at the bar of public opinion are held responsible for corporate frauds, and it is to the character and position of the directors, and not that of the stockholders, that the public look for its estimate of corporate responsibility. The feeling of the

public, indeed, with reference to the nature of a corporation, is much nearer the truth than the accepted theory of law. So contrary, indeed, to the real nature of corporations is the legal assumption that it is the directors and not the stockholders who are responsible for improper corporate acts, that the courts have usually been compelled, upon one plea or another, to release the stockholders from such liability, with the unfortunate result that innocent third persons, defrauded by persons pretending to act as the corporation, have often had no redress except against the empty corporate treasury. If, however, the courts but held the directors to that responsibility which is properly theirs, full justice would be done and third persons and stockholders alike protected—as in such case the public would be justified in relying upon the character of the directors, instead of being ensnared thereby to its loss.

It is now probably too late to expect the courts to reverse the unfortunate position assumed by them, but it is to be hoped that the present evil may be cured by statute. Let the legislature but once impose upon corporate directors the responsibility which in justice and in law should be theirs, and fraudulent corporations would surely become things of the past, since being known by their directors, they would be incapable of injury.

*Henry Winslow Williams.*

Baltimore, October, 1898.

## GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART II.

### *The Right to Interfere.*

#### A. The Attitude of the Courts in the "Due Process" and "Pursuit" Cases.

In taking up the first of our two inquiries, "Has a government the right to dictate the terms of the contracts of its subjects," we encounter a problem peculiarly American, in that here the question is judicial rather than legislative, and involves a discussion of the *power* to pass any proposed law, as well as the *policy* of doing so. The American people, before the Revolution, had received a striking lesson of the impolicy of arbitrary exercise of authority by a general legislative body. So the Constitution was ratified only on the understanding that a "Bill of Rights" should be added, to limit the power of Congress. In the Civil War and Reconstruction periods another lesson was learned of the danger of arbitrary action by local legislatures. So the Fourteenth Amendment, limiting state legislative power, became a part of the Constitution, and a large proportion of the litigation in the Federal courts now arises under its provisions.<sup>1</sup>

Many state constitutions contain Bills of Rights which embody statements similar to that of the preamble to the Declaration of Independence, that among "inalienable rights" are "life, liberty and the pursuit of happiness"—or, as often expressed, "life, liberty, *property* and the pursuit of happiness"—and which sometimes also contain a reproduction of that clause in the Fourteenth Amendment which forbids deprivation of life, liberty or property "without due process of law." Under this general language it is very easy to declare unconstitutional almost any law which seems to the judiciary im-

<sup>1</sup> See "The Fourteenth Amendment," by W. D. Guthrie, p. 27, *et passim*.



politic, especially if the word "liberty" receives the definition given it by Chief Justice Sharswood—"absence of restraint, except by *equal, just and impartial* laws."<sup>1</sup>

The result of this attitude is the "new canon of constitutional law, viz., *that a statute interfering with 'natural rights' must be shown to be authorized, not that it must be shown to be prohibited.*"<sup>2</sup>

The advocate of any scheme of constructive legislation has thus thrown upon him a double burden of proof. He must not only show a need that will be met by the proposed statute, must not only show that public policy calls for the law, but he must go farther and affirmatively prove, to the satisfaction of the judiciary, that the legislature has the enacting power. Such decisions as have upheld laws interfering with "natural rights" have admitted<sup>3</sup> a presumption, created by constitutional Bills of Rights, against the power to enact such laws, and have rebutted that presumption by calling in another, viz., that all constitutional restrictions leave untouched the "police power" of the state. This "police power," which alone can be exercised in abridgment of the "natural rights of man," is as shadowy and uncertain as are those rights themselves. No definition is possible. One can only say that it means *the power to pass laws*. It cannot mean laws of any particular kind, for statutes on every imaginable subject have been held to be within it.

It "is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation

<sup>1</sup> See 1 Sharswood's Blackstone, p. 127, n.; also 1 Lewis's Bl. p. 127. The latter editor adds to Sharwood's note, "Perhaps, however, liberty is not attained until, as under the Constitution, State and Federal, in the United States, there is a sphere of individual liberty of action which is protected from governmental interference, *i. e.*, the right to pursue any calling."

<sup>2</sup> Mr. Richard C. McMurtrie, in 32 AM. LAW REG. (N. S.) 1, 9, January, 1893.

<sup>3</sup> *E. g.* "That no general *power* resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or of services, or interfere with freedom of contracts, we cannot doubt:" Andrews, J., in *Peo. v. Budd*, 117 N. Y. 1, 15 (1889).

and government of the state, necessary for the public welfare ;”<sup>1</sup> “nothing more nor less than the power of government inherent in every sovereignty to the extent of its dominions.”<sup>2</sup>

The limit of its field depends on the court before which the question comes. The dividing line between this “police power,” this general right of the legislature to pass the laws it deems best for the well-being of society, on the one hand, and on the other, the “inalienable natural rights,” the constitutional “free-born,” “Anglo-Saxon” right not to be bothered by laws, is drawn, in most instances, not from judicial but from economic considerations. The decision is apt to be, because the policy of the law under discussion does not appeal to the judges, because the “paternal theory of government is odious” to them, because they think the “happiness” of mankind will be best promoted by the least governmental interference.<sup>3</sup>

<sup>1</sup> *Peo. v. Budd*, 117 N. Y. 1, 14; 5 L. R. A. 559, 565 (1889), *Andrews, J.*

<sup>2</sup> *Taney, C. J.*, in the *License Cases*, 5 How. 504, 583 (1847).

<sup>3</sup> The majority opinions in cases pronouncing “interference” laws unconstitutional, and the dissenting opinions in cases reaching an opposite result, are full of language showing this utter confusion of policy and power, of legislative and judicial functions. *Gordon, J.*, in *Godcharles v. Wigeman*, 113 Pa. 431 (1886), a “Company Store” case, grows angry over the “insulting attempt to put the laborer under a legislative tutelage.” In *State v. Goodwill*, 33 W. Va. 179, 186 (1889), another case involving a “Truck Act,” *Snyder, P.*, says the law “is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile.” It is refreshing to turn from this to the opinion of *Lucas, P.*, *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 838 (1892), a case virtually overruling the preceding. He says, “How far this act may be objectionable as being what the counsel call ‘paternal legislation’ I have not considered, deeming that a matter for the legislature, not for the courts.” In contrast are the words of *Brannon, J.*, dissenting, at p. 856, “Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away.” Like this is the pathetic language of the New York Court of Appeals in pronouncing unconstitutional a law prohibiting the manufacture of tobacco in tenement house “sweat shops,” when it declaims against the iniquity of “forcing the cigarmaker from his home and its hallowed

A most striking indication of the widespread character of this belief in implied or general restrictions on legislative power, is found in the discussion in other states of the provision in the constitution of the State of Massachusetts, which empowers the legislature "to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same."<sup>1</sup> It is also declared in the first article that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and

associations and beneficent influences:" *Re Jacobs*, 98 N. Y. 98, 113 (1885).

Mr. Justice Brewer is, perhaps, the most thoroughgoing individualist on the Supreme Bench, and never hesitates to display his philosophy of government in his judicial opinions. While a member of the Kansas court, he said, in a dissenting opinion (*State v. Nemaha County*, 7 Kana. 542, 554-5 (1871)), "The object of the constitution of a free government is to grant, not to withdraw, power. . . . The habit of regarding the legislature as *inherently omnipotent*, and looking at what express restrictions the constitution has placed upon its action, is dangerous, and tends to error. Rather, regarding first, those essential truths, those axioms of civil and religious liberty upon which all free governments are founded; and secondly, statements of principles in the Bill of Rights, upon which the governmental structure is reared, we may then properly inquire what powers the words of the constitution, the terms of the grant, convey." He approves (p. 557) the practice of declaring an act of the legislature void "*because it does not fall within the general grant of power to that body.*"

In his dissent, in *Budd v. New York*, 143 U. S. 517, 551 (1891), the learned justice avows how "odious" to him is the "paternal theory of government" and expresses his apprehension that "Looking Backward" may be "nearer than a dream." Again, dissenting, in *Brass v. Stoeser*, 153 U. S. 391, 410 (1894), he fears "that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost." In *Holden v. Hardy*, 169 U. S. 366 (1897), holding constitutional an eight-hour law for miners, Mr. Justice Brewer once more dissented, but delivered no opinion.

<sup>1</sup> Mass. Con. Pt. II, ch. 1, sec. 1, art. 4.

obtaining their safety and happiness." This seems to differ from corresponding articles of other constitutions only in that it speaks of "seeking" happiness instead of "pursuing" it. Nevertheless, the language first quoted has actually been considered to give the Massachusetts legislature an *extraordinary degree of power, and thus to explain decisions of the Massachusetts courts upholding laws impairing the freedom of contract!*<sup>1</sup> The implication being that these laws would be invalid in the absence of such general grant of power as that in the article cited. Such ideas go far to show what a preponderance of authority we have come to assign the judiciary in the United States.

We find, then, a general prejudice, judicial and lay, against the power to enact laws regulating contracts. The attempt to bring any specific statute within the "police power," which courts allow still resides in legislative bodies, to a greater or less degree according to the potency assigned in this or that locality to declarations of rights, and Fourteenth Amendments, entails most often a complete examination of the policy of the proposed law. In no other way can most courts determine the victory in the battle of Police Power against Natural Rights.

In the labored effort to find justifications for permitting the law-making branch of the government to do here, what it does in every other county of the globe, without judicial dispute, and as far as concerns the question of power, without the necessity of justification, many "speculative, if not fanciful reasons have been assigned."<sup>2</sup> These reasons, the speculative and fanciful, as well as the solid and substantial, are in a measure susceptible of classification. The rough outline given in the first article of this series will here be followed.<sup>3</sup>

<sup>1</sup> See *Ritchie v. Peo.*, 155 Ills. 98, 115 (1895), where Magruder, J., says of *Comm. v. Mfg. Co.*, 120 Mass. 385 ( ), "The decision referred to was evidently made in view of the large discretion so [*i. e.*, in the constitution] vested in the legislative branch of the government." See, also, Stimson's "Handbook of the Labor Laws of the United States," p. 6.

<sup>2</sup> *Peo. v. Budd*, 117 N. Y. 1, 25 (1889), Andrews, J.

<sup>3</sup> See the December (1898) number of this magazine.

B. Reasons that have been Advanced for Bringing any Specific "Interference" with Contracts within the "Police Power of the State," Granting an Implied Prohibition of such Legislation in General.

1. Public Character of Parties to Contract.

(a). Artificial Persons.

(b). Persons under Special Governmental Favor.

Transportation, interference with which is the principal subject of the present investigation, in modern times is chiefly carried on by corporations, and by corporations enjoying privileges, such as that of eminent domain, which would seem to render them peculiarly liable to state control. Transportation companies, then, would come under both of the sub-heads given above, and if the reasons thereby indicated are justified, if they are not "speculative and fanciful," inquiry as to governmental power over transportation contracts need go no farther.

(a). *Artificial Persons.*

First, as to the artificial character of the corporate personality. Since the Dartmouth College case all charters are granted subject to alteration, amendment or repeal. If a charter, as originally issued, expressly or impliedly allows the corporation to make such contracts in the course of its business as it may choose, does the reserved right to alter and amend of itself justify the state in taking from its creature the management of the business for which it was created? The idea that it does, seems to the writer the result of that metaphysical, strained conception of a corporation as *an actual personality*—to be sure, "invisible, intangible" and to be found "only in contemplation of law"—but still so real as to take from the consciences of its members all moral responsibility for its actions on the one hand, and on the other hand to suffer every sort of restriction, attack and deprivation, as though it were some strange enemy of the people—some sky-dropping Martian, or, rather, some too-cleverly fashioned Frankenstein—to be slain. If the government has no right to interfere with an individual, it certainly has no such right in case of a partnership, or a limited partnership, or a

joint stock company. Why is it different with the corporation, between which and the joint stock company in most cases only an arbitrary distinction of name exists? "Behind the artificial body created by the legislature stand the corporators, natural persons, who have united their means to accomplish an object beyond their individual resources, and who are as much entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held as before they had associated themselves together.<sup>1</sup>

Support has been given this theory, however, not only by numerous loose expressions in the transportation cases, but more specifically in at least one case in the Supreme Court of the United States,<sup>2</sup> a case involving governmental regulation of water rates. Waite, C. J., said (p. 352), "The Spring Valley Company is an artificial being, created by and under the authority of the legislature of California, . . . and, consequently, this company was, from the moment of its creation, subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body . . . (p. 355). The question here is . . . between the state and one of its corporations as to what corporate privileges have been granted. The power to amend corporate charters is, no doubt, one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with the authority to make them." This language, doubtless, was applicable to the peculiar circumstances of that case, though it is noteworthy that the interference of the state was justified also on the ground of "public interest." But other cases, notably those dealing with laws regulating contracts of employment, have pushed the theory to its utmost.

In this line of cases stress is laid on the fact that no powers of contract or powers of any kind belong to the corporation

<sup>1</sup> Field, J., dissenting, in *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 371 (1884).

<sup>2</sup> *Spring Valley Water Works v. Schottler*, *supra*.

until conferred upon it by the state; that also, under the right of repeal, all capacities of every sort may be at once withdrawn, with or without reason assigned. How much more, it is urged, ought the state to have the power to *modify* those privileges which it alone has granted, and which it alone may take away.<sup>1</sup> But these cases have been disapproved by the latest expression of judicial opinion on the subject. The Supreme Court of Massachusetts,<sup>2</sup> when asked, "Is it within the constitutional power of the legislature to extend the application of the present law, relative to the weekly payment of wages by corporations, to private individuals and partnerships . . . ?" replied: "We know of no reason, derived from the Constitution of the Commonwealth or of the United States, why there must be a distinction made in respect to such legislation between corporations and persons engaged in manufacturing when both do the same kind of business." The court points out that the statutes in question *do not purport* to be passed for the purpose of restricting the *corporate powers* of corporations.

The apparent paradox in the statement that the state may arbitrarily, if you please, bring a corporation into being, and likewise deprive it of being, as it may not an individual—while yet the corporation, *during its life*, has substantially the same property and contract rights as the individuals who compose

<sup>1</sup> Mr. Justice Brewer, dissenting, in *Budd v. New York*, 143 U. S. 517, 552 (1892), says: "I believe . . . that government can prescribe compensation only when it grants a special privilege, *as in the creation of a corporation* (italics mine), etc." *Braceville Coal Co. v. Peo.*, 147 Ill. 66 (1893), pronounced unconstitutional an "interference" law applying to certain enumerated corporations, in part because the constitution of Illinois forbids amendment of corporate charters by special laws. *Shaffer v. Mining Co.*, 55 Md. 74 (1874), held valid a "Truck Act" relating to corporations, while expressing the strongest reprobation of any such restriction of individual employers. *State v. Browne & Sharpe Mfg. Co.*, 18 R. I. 11, 23 Atl. 246 (1892); *Leep v. R.*, 58 Ark. 407, 25 S. W. 75 (1894); *Hann v. State*, 54 Pac. (Kan.) 130 (1898), *accord*. The distinction receives some countenance also in *State v. Peel Splint Co.*, 36 W. Va. 802 (1892). Other cases almost universally have treated all employers, whether corporations or individuals, as alike subject to, or free from, such state regulation.

<sup>2</sup> Opinion of the Justices, 163 Mass. 589 (1895).



it—is explained very well by Mr. Henry Winslow Williams.<sup>1</sup> The divesting of the corporation of control over its contracts, while it is “still an existing person and recognized as such in the law,” Mr. Williams shows clearly, would operate to restrict the rights of the corporators precisely to that extent. On the contrary, a withdrawal of the charter would leave the corporators free to act in their individual capacity with respect to the property and business formerly controlled by them in the corporate name. In short, we are brought to the conclusion with which this section began, that partnerships, joint stock associations and corporations stand, in substance and reality, on the same footing.

(b). *Persons Under Special Governmental Favor.*

Under the second sub-head come the “legal monopoly” theory propounded by Mr. Justice Field in his famous dissent in *Munn v. Illinois*, and by Mr. Justice Brewer in his equally well-known opinion in *Budd v. New York*, and the “enjoyment of public franchise” explanations of legal control of railway rates.

The principle here indicated is sometimes expressed as follows: “*Where peculiar privileges are granted by the state, peculiar responsibilities supervene, and special regulations may be imposed.*”<sup>2</sup>

What are these “peculiar privileges?”

They may consist in the monopoly of something before open to competition. In this case the philosopher of individualism should make his objection before the later stage of mere regulation is reached. Grant the monopoly, and slighter control certainly follows, as the greater includes the less. Mr. Justice Brewer says:

“It is suggested that there is a monopoly, and that that

<sup>1</sup> See Mr. Williams' able article, “An Inquiry into the Nature and Law of Corporations,” 38 AM. LAW REG. (N. S.), p. 72, *et seq.*, February, 1899. The statement in the text, of course, does not have reference to cases in which special reservations of state control have been made in the original grant. Then the regulation is a part of the contract, and is exactly what was bargained for by the natural persons “behind the corporation.”

<sup>2</sup> *State v. Speel Splint Coal Co.*, 36 W. Va. 802, 811 (1892).



justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. *The one exists where exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control*" (italics mine).<sup>1</sup> Apparently it does not occur to the learned justice that any inconsistency is involved in the defence of regulation by monopoly, of partial control by absolute control. But this argument supposes first a monopoly, a legal monopoly. How do you get that monopoly? Without doubt by a species of "interference" compared with which "regulation" is mild indeed. Would the situation in *Budd v. New York* have been aided had the legislature first declared the elevator business a monopoly, and *then* proceeded to specify the rates of compensation? This question seems to be answered in the asking. If a business in its nature is incapable of government regulation, it is also incapable of being rendered a monopoly by governmental action. The "legal monopoly" theory, then, appears to be a mere truism, or else it is without meaning, as applied to actual cases.<sup>2</sup>

The government may favor corporations of a certain class by giving them privileges beyond those usually bestowed. Thus a mining corporation may have added to it the right to lay out towns, to run a railroad or line of steamers, or to engage in manufacturing. Such privileges have been held in some cases to give the legislature control over the beneficiaries to a degree beyond that over persons or corporations not so favored.<sup>3</sup> If the right to interfere was reserved by the state as a condition of the additional grant, certainly it would be a part of the contract, and its exercise can become no cause of complaint to the corporators. But in any other case,

<sup>1</sup> *Budd v. New York*, dissenting opinion, 143 U. S. 517, 550 (1892).

<sup>2</sup> It would seem that *Allnut v. Inglis*, 12 East, 527 (1810), the case of the London wharfingers, which the dissenting justices in the various grain elevator cases have declared to be no precedent for regulation, because of the legal monopoly there involved, is really a precedent, if for anything, not only for what was alleged, but even for more than anything now contemplated in this country.

<sup>3</sup> See the West Virginia cases, *supra*.

the same objections would seem to apply here, as to the theory based on the original bestowal of corporate privileges. Besides, to continue the mining illustration, a regulation such as the eight-hour law upheld in *Holden v. Hardy*,<sup>1</sup> or a "Screen Act,"<sup>2</sup> which should be valid as to mines owned by specially favored corporations, but invalid as to mines owned by ordinary corporations or by individuals, would be absurd in its inefficiency.

Again the "special privileges" may consist in the grant of a "public franchise" or license for carrying on a business necessarily involving the exercise of some prerogative of the state, as eminent domain, or the use of the public highways on land or water. A discussion of this topic will run almost indistinguishably into that on the second sub-head of the second section, viz.: the "Contract of Public Service." An employment carried on under a public franchise will of necessity be a "public" employment, and an employment recognized as public will for that reason require for its license a "public" franchise. Each is the cause and each the result of the other. The "eminent domain" branch of the state prerogative is perhaps the one really noteworthy in this connection. Just the weight which should be attached to it must be determined by an historical view of the legal control of common carriers, to inquire whether this regulation was exercised before or after the prerogative of eminent domain commonly "subsisted in the hands of a subject." This will involve the further inquiry whether all matters of business now considered public in the legal sense, were not so at the start in the "virtual" or actual sense only, first affecting people generally in their private capacity, and then as a result drawing down the attention of the nation; and whether grants of powers like eminent domain, and regulations limiting the right

<sup>1</sup> 169 U. S. 366 (1897), *Brown*, J.

<sup>2</sup> Like the one pronounced void in *Commonwealth v. Brown*, 8 Pa. Super. 339, affirming 6 D. R. 773 (1898). The opinion of Rice, P. J., is remarkable for the failure to notice the recent decisions upholding legislation of the kind before the court. The earlier West Virginia and Massachusetts cases are treated at length, but the later decisions practically overruling the others are entirely ignored.

of contract, instead of being in the relation of cause and effect, may not rest on a common basis, *i. e.*, the public interest in the business. And it may be suggested that possibly the habit of mind which seeks explanations such as those here treated, may be that which "reads its fundamental ideas . . . back into history."<sup>1</sup> The discussion under the "Contract of Public Service" will include the matters here touched upon.

## 2. Public Subject Matter of Contract.

### (a). Sale of Public Commodity.

Certain species of property have been considered not capable of complete private ownership, but to belong to the people in general, or the state. Among these are wild animals and things of a similar nature. In *Geer v. State of Connecticut*,<sup>2</sup> Mr. Justice White, quoting from Pothier,<sup>3</sup> classes among *res communes* air, water which runs in rivers, the sea and its shores, and animals *feræ naturæ*, and shows that property in wild beasts is regarded as common or in the state over all the continent of Europe. Blackstone<sup>4</sup> also classes wild animals with air, light and water as peculiarly subject to governmental authority. In the case cited it was held (Harlan and Field, JJ., dissenting, and Brewer and Peckham, JJ., taking no part in the decision), that ownership of game within the limits of a state, so far as it is capable of ownership, is in the state for the benefit of all its people in common, and that the police power authorizes a state to forbid the killing of game to be transported beyond its limits. A similar decision was *Lawton v. Steele*,<sup>5</sup> Fuller, C. J., Brewer and Field, JJ., dissenting. In *McCreedy v. Virginia*,<sup>6</sup> the power of the State

<sup>1</sup> See article by Dr. Wm. Draper Lewis, 36 Am. L. Reg. (N. S.) p. 4, January, 1897.

<sup>2</sup> 161 U. S. 519, 16 S. C. 600 (1896).

<sup>3</sup> *Pothier Traité du Droit de Propriété*, No. 21. See also Code Napoleon (Articles 714, 715).

<sup>4</sup> 2 Bl. Com. 14, 394, 410.

<sup>5</sup> 152 U. S. 133, 14 Sup. Ct. 499 (1894). The statute in question, which was decided constitutional, declared nets, etc., used in violation of game laws public nuisances, which the official game protectors were authorized to destroy.

<sup>6</sup> 94 U. S. 395 (1876).

of Virginia to restrict the planting of oysters was upheld. In *Commonwealth v. Gilbert*<sup>1</sup> a statute imposed a penalty on every person who "sells or offers or exposes for sale, or has in his possession a trout," except alive, during the close season. This statute was decided to apply constitutionally to trout artificially propagated and maintained. In *Gentile v. State*,<sup>2</sup> a statute was decided to be constitutional which forbade the taking of any fish in any way for two years, even by an owner of the lake or stream. So, in *People v. Bridges*,<sup>3</sup> an anti-seine law was held to include within its prohibition a lake wholly upon lands of a private owner and unconnected with other waters except with a small, unnavigable stream, and that only at flood time.<sup>4</sup>

*People's Gas. Co. v. Tyner*,<sup>5</sup> following the Pennsylvania case of *Westmoreland, Etc., Gas Co. v. DeWitt*,<sup>6</sup> classes water, oil and gas as minerals *feræ naturæ* subject to the same public control as wild animals.<sup>7</sup> Accordingly, in the recent Indiana case of *Townsend v. State*,<sup>8</sup> it was decided that an act punishing the wasteful burning of natural gas in flambeau lights does not deprive the owner of property without due process of law, nor does it violate the rights of "life, liberty and the pursuit of happiness."<sup>9</sup> The Supreme Courts of both Indiana

<sup>1</sup> 160 Mass. 157, 35 N. E. 454 (1893).

<sup>2</sup> 29 Ind. 409, at 415 (1868).

<sup>3</sup> 142 Ills. 30, 16 L. R. A. 684 (1892).

<sup>4</sup> On game and game laws see 8 Am. & Eng. Ency. Law, 1024, *et seq.* Domestic animals cannot be controlled in the same manner, of course, since there is no public ownership. See *City of Helena v. Dwyer* (Ark.), 39 L. R. A. 266 (1897), a case in which an ordinance forbidding the sale of fresh pork between June 1st and October 1st was held void as violating the inalienable right of man to procure food.

<sup>5</sup> 131 Ind. 277, at 281, 282 (1892).

<sup>6</sup> 130 Pa. 235, 18 Atl. 724 (1889).

<sup>7</sup> The reasons for classing gas and oil among the *res communes* appear to be as strong as those placing water there. The same fugitive character marks all, and it seems that if the hydro-carbon fluids had been known in the days of Pothier and Blackstone, their classification would have been extended to include them.

<sup>8</sup> 147 Ind. 624, 47 N. E. 19 (1897), McCabe, J.

<sup>9</sup> This marks another successful attempt of the Indiana legislature to control the use of natural gas. *State v. Gas Co.*, 120 Ind. 575, 22 N. E.

and Pennsylvania thus contend that the ownership of gas and oil in their natural condition, as well as that of wild animals, is in the state, which accordingly can make such regulations concerning them as it sees fit. If these decisions be sound it would appear that the state may prescribe the exact manner in which the owners shall use the gas and oil they have drawn from their own land, or fix arbitrarily the prices at which these articles shall be sold, or even prohibit absolutely their use in any form. This ought to furnish a short and easy way with the Standard Oil Company. It would seem from these decisions that the company is making its millions a-month from the sale of a commodity which in its natural condition really belongs to the state.

Land itself, in its "wild" and unimproved state, has never been considered capable of complete private ownership in England. That fact has been used to explain the Irish Land Acts, which violate what in this country would be called the vested property and contract rights of the landlords. The villainous system of "rack-renting," which we have heard attacked so eloquently here and which, in our sympathy for the wrongs of Ireland, we have come to believe the very essence of evil, is nothing in the world but "freedom of contract," applied to the land. Here the advocates of land nationalization or rent confiscation have not yet succeeded in influencing legislation.

Those who favor the nationalization of railroads and other transportation systems, as being what are called "natural monopolies" and, therefore, rightfully the property of all instead of the few, if successful in their schemes would render unnecessary any discussion such as the present. That which

778 (1889), declared unconstitutional a law prohibiting the piping of natural gas to any point without the state. This law (which was passed because of the projected piping of gas from the Indiana districts to Chicago) was said not to be a legitimate exercise of police power, but an attempt to regulate interstate commerce. But *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76 (1891), Olds, J., dissenting, held constitutional an act prohibiting a pressure of more than 300 pounds to the inch, which was designed to accomplish indirectly, the same end as that to which the former statute was directed.

belongs to the state, certainly the state could control, and the traffic in transportation facilities would then be the "sale of a public commodity." The countries of continental Europe have quite generally acquired the property in their railroads and street-car lines. Switzerland has just within a few months voted for state purchase of its railroads.

This consummation, to be dreaded or desired, is a possibility of interest as the pole which has as its opposite entire non-intervention, a policy contended for by many individualists in the United States, but never actually adopted anywhere. We in America have sought for fifty years a halting-place between these extremes. For half a century we have had little or no state or municipal ownership and apparently little demand for it. But an agitation seems to have begun, in Chicago particularly, for city ownership of street railways. The effect of this lies in the future. Just now the discussion under this sub-head that is chiefly pertinent to the present inquiry, relates to the early common law regulation of wharfingers, as bearing on the vexed question of "virtual" monopolies, already referred to.<sup>1</sup>

The treatise *De Portibus Maris*, of Lord Hale, cited in pretty nearly all the cases dealing with government regulation of contract, asserts that the charges of "public" wharves must be reasonable, "because they are the wharves only licensed by the Queen, or *because there is no other wharf in that port.*" The italicized words have aroused great controversy. The individualists have given an explanation which is pronounced "fanciful" by Andrews, J., of the New York Court

<sup>1</sup> It is hard to understand why so much has been said of the common law rules on this particular topic. Everybody knows that contemporaneously with the writing of Lord Hale's treatise, there prevailed all kinds of government interference with all kinds of things; and also that little time was wasted by the "practical" men who shaped legislation, in elaborating this or that theoretic justification of their action. It is not to be supposed that the statutory enactments alone were mediæval and that the judge-made common law, which in its sacred purity descended to us and furnished the rule by which to measure the grants and reservations of power in our written constitutions, is entirely susceptible of explanation on modern American theories.

of Appeals,<sup>1</sup> but which has the high support of the late Justice Cooley: " . . . The title to the soil under navigable water in England is in the Crown, and . . . wharves can only be erected by express or implied license, and can only be made available by making use of this *public property in the soil* (italics mine.) If, then, by public permission, one is making use of the public property, and he claims to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms"<sup>2</sup>—or, as it might be expressed, he is selling a privilege (wharfage) *which belongs to the state*. There are two objections to this argument: (1) It ignores the fact that the property of the Crown in the soil under navigable water was only presumptive, and might be rebutted by evidence of grant, express or implied; and the further fact that no difference is made in the books, as to the necessity of reasonable charge, between wharves erected on private and those on public soil. The same was true of ferries. "No man could set up a ferry, *although he owned the soil and landing places on both sides of the stream*, without a charter from the King, or a prescription, time out of mind. The franchise to establish ferries was a royal prerogative" which . . . "was vested in the King, as a means by which a business, in which the whole community were interested, could be regulated."<sup>3</sup>

(2) It gives the statement of Lord Hale, viz., that private property "affected with a public interest *ceases to be juris privati* only," a restricted meaning no hint of which is found in *De Portibus Maris*, or in contemporary reports and treatises. This acceptance of the decision, qualified by supplemental or different reasons therefor, comes dangerously near treating the words of the jurist "as the utterances of

<sup>1</sup> Peo. v. Budd, 117 N. Y. 1, 25 (1889).

<sup>2</sup> Cooley's Constitutional Limitations, p. 738.

<sup>3</sup> Andrews, J., in Peo. v. Budd, *supra*, at p. 17.

Balaam's ass—absolutely true, but not proceeding from any conscious intelligence."

On the whole, it may safely be said that government ownership of the article or privilege sold is of very little present bearing, theoretic or practical, on the control of transportation charges in the United States.

*Roy Wilson White.*

(To be continued.)



## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ADMIRALTY.

It may be remembered that in 37 AM. LAW REG. (N. S.) 233, the decision of the District Court in the case of *The International Vessels*,<sup>1</sup> holding that a steam dredge is a vessel and not dutiable as "goods, wares and merchandise," was commented upon, and reference made to the appeal that had been taken. The decision of the Circuit Court of Appeals, Third Circuit, affirming that of the court below, appears in 89 Fed. 484. The argument of Bradford, J., that because ice-boats and pleasure yachts are vessels, though the former be designed solely to keep navigation open, and the latter may carry neither passengers nor merchandise for hire, therefore, this steam dredge is also a vessel, seems to be a complete *non sequitur*. The reference to *The Conqueror*, 166 U. S. 110, is also not conclusive. Everyone knows that "vessels" are not dutiable within the tariff acts; the question was whether a steam dredge is a "vessel." It is to be regretted that the opinion of the Supreme Court will probably not be obtained on this point, though it is most likely that the same result would be reached.

The predictions of the weather bureau are often incorrect, it is true, but the Circuit Court of Appeals for the Third Circuit does not consider that tugs which start on a voyage relying on such predictions should be considered negligent or careless, as was urged by counsel for the libellants in the case of *The E. V. McCaulley*, 90 Fed. 510. As it appeared that the loss of the tow was not attributable to the breaking of the hawser, which it was claimed was of insufficient strength, but that the tow would have been lost anyway in the violent storm encountered, the decree of the District Court, dismissing the libel, was affirmed.

**CARRIERS.**

It is not necessarily negligence in a passenger to ride on the platform of a car, and a railway company waives its notice against standing in that position when it fails to provide a seat for the passenger, and yet, receives him on the train. The fact that there is standing room on the inside of a car does not raise a conclusive presumption of negligence. The question is for the jury: *Graham v. McNeill* (Supreme Court of Washington), 55 Pac. 631. The authorities support this ruling: Hutchinson, Carriers (2d Ed.), § 652; Beach, Contributory Negligence (2d Ed.), § 149; Shearman & Redfield, Negligence, § 284; Wood, Railway Law, § 308.

The obligation of a carrier to exercise a degree of care proportioned to the bodily condition of the passenger, was enforced in *Haug v. Great N. R.*, 77 N. W. (N. Dak.) 97. Plaintiff's husband was carried beyond his destination by the defendant company's negligence, and was put off at the next station. He was in an irresponsible and helpless condition of drunkenness, a fact known to defendant's servants, and the night was bitterly cold; he was not allowed to remain in the railway station, which was closed for the night soon after the train left, and no other accommodations were available. Death resulted from exposure. Judgment for defendant on demurrer was reversed by the Supreme Court.

The exact case has never before arisen, but the decision seems in line with the authorities: *Louisville, Etc., R. v. Sullivan*, 81 Ky. 624 (1883), [ejection between stations on a cold night]; *Louisville, Etc., R. v. Ellis*, 97 Ky. 330 (1895), [train coming]. In *R. v. Valleley*, 32 Ohio St. 345 (1877), and *Haley v. Chicago & N. W. R.*, 21 Iowa, 15 (1866), [drunken passenger run over by later train], the expulsion itself being considered not the proximate cause. See, also, *Roseman v. Carolina C. R.*, 112 N. C. 709 (1893); *Louisville, Etc., R. v. Johnson*, 92 Ala. 204 (1890); 2 Shear. & R., Neg., (5th Ed.), § 493; 3 Wood, Railroads, (2d Ed.), § 362. Wilson, J., in *Giles v. Great W. R.*, 36 Upper Canada, 369, declared that a conductor, who knew the intoxicated and helpless state of the passenger, was bound to give him that degree of attention . . . which a man in the state of the deceased is fairly entitled to *beyond that of the ordinary passenger*.

## CONSTITUTIONAL LAW.

In *Austin v. State*, 48 S. W. 305 (Supreme Court of Tennessee), the Tennessee Act, prohibiting the manufacture and sale of cigarettes, was held to apply constitutionally to those brought in from other states. **Interstate Commerce, Cigarettes, Original Packages** Two remarkable resolutions were made by the court: (1) Cigarettes are so well-known to be deleterious, morally and physically, that courts will take judicial notice of that fact and of the resultant fact that they are not proper subjects of interstate commerce; (2) A covered basket, owned by the carrier and used for convenient transportation of packages of cigarettes, is, itself, an "original package," broken as soon as the lid is raised.

The Supreme Court of Georgia has decided that a salesman taking orders by sample for goods manufactured in another state, is not engaged in interstate commerce, if the orders are filled, not from the point of manufacture, but from a distributing warehouse located in the state in which the salesman operates. Such a salesman is, accordingly, subject to a local license law: *L. B. Price Co. v. City of Atlanta*, 31 S. E. 619. It seems clear that the court is right. Products shipped in advance of sale to a distributing depot in the state of sale, certainly become intermingled with the general mass of property there, and both the goods and the selling of them should be taxable: *Brown v. Houston*, 114 U. S. 622.

One who, of his own accord, invokes the aid of a court cannot afterwards complain of its decision. The case of *Grant v. Buckner*, 19 Sup. Ct. 171, decides that a receiver in a Federal court who voluntarily goes into a state court cannot question the right of that court to determine the controversy between himself and the other party in the suit. **Federal Court, Right of Withdrawal**

The South Carolina Revenue Bond Scrip, issued under the Act of March 2, 1872, being made receivable for taxes and for payment of obligations owing by the state, was intended to pass as money, and under the United States Constitution, is void: *Wesley v. Eells* (Circuit Ct., N. D. Ohio), 90 Fed. 151. **"Bills of Credit"**

## CONTRACTS.

In *Atcheson, T. & S. F. Ry. Co. v. Cunningham* (Supreme Court of Kansas), 54 Pac. 1055, it was held that a release

CONTRACTS (Continued).

**Undue Influence, Release to Railway Company** obtained from an injured passenger by a railroad agent, shortly after the accident, was invalid, since it appeared that the wounds operated to make the passenger weak both physically and mentally.

In *De Baun v. Brand*, 41 Atl. 958, the Court of Errors and Appeals of New Jersey decides that the rule that it is **Auction, Agreement Not to Bid** contrary to public policy for persons to enter into an agreement having for its object the suppression of competition in bidding at a public sale, is not applicable to the case of a person who, having an interest in the property to be sold, for the protection of such interest, agrees not to bid at the sale.

The Court of Errors and Appeals of New Jersey, in *Hensler v. Jennings*, 41 Atl. 918, holds that under a statute providing that any person who deposits money with **Wager, Liability of Stakeholder** a stakeholder upon the event of a wager prohibited by any law of the state, may sue for and recover the same, a person making such deposit may recover, though the event on which the wager is laid takes place out of the state.

The Supreme Court of Iowa has decided that the use of profane and insulting language is no excuse for a refusal to **Refusal to Allow Completion** permit one to carry out a contract, when the conduct of the other party tended strongly to provoke such outburst: *Thompson et al. v. Brown et ux.*, 76 N. W. 819.

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CORPORATIONS.

Can a principal, who was not in existence at the time a contract was made, be held liable upon it by an application of **Contracts of Promoters, Ratification** the doctrine of "ratification?" If it be asked whether a contract made on behalf of an unborn child can afterwards be enforced against him upon his birth and coming of age, the answer will doubtless be in the negative, even if he has, in expressed words, signified his willingness to be bound. So, also, if it be asked whether (for example) an undertaker, who has buried a testator at the request of a relative, can recover in *contract* against an executor subsequently appointed, it will probably be concluded that, whatever his rights may be, they are not *contract* rights—even

## CORPORATIONS (Continued).

if the executor expressly promises to pay. The doctrine of ratification has no application where the principal is not in existence at the date of the act in question. See *Melhado v. Porto Allegre Ry. Co.*, L. R. 9 C. P. 503 (1874). Where A sells goods at B's request, on the credit of a corporation thereafter to be organized, and the corporation receives the goods and uses them, how can A have a contract right against the corporation? It is submitted that he can have no such right, although the courts persistently refuse to analyze such a case and profess to explain it upon a doctrine of "ratification," as was done by the Court of Civil Appeals of Texas, in *Lancaster Gin & Compress Co. v. Murray Ginning System Co.*, 47 S. W. 387. Of course, A, in such a case, is entitled to recover—just as the undertaker is entitled to recover in the illustration given. The recovery, however, is in *quasi-contract*, for the benefit conferred. The distinction is not only of theoretical importance, but may be of great practical importance, as appears from such an unjust decision as *Tift v. Quaker City Bank*, 141 Pa. 550 (1891).

In Kansas (Gen. St. 1889, c. 23, §§ 32, 46), there is a statutory provision to regulate the right of a judgment creditor of a corporation to enforce against a stockholder his liability for unpaid balances, and an additional statutory liability equal to the amount of the defendant's stock. In *Musgrau v. Association*, 49 Pac. 338, it was decided that against this additional statutory liability the stockholder may set-off sums paid by him in discharge of corporate debts and claims held by him against the corporation. The Circuit Court for the District of Maryland, in a case involving the Kansas statute, has now properly held a plea of set-off bad which fails to show whether the counterclaim was acquired before or after the corporate insolvency; and if after, what percentage of its face value the defendant paid for it: *Brown v. Trail*, 89 Fed. 641.

The courts of New Jersey display a commendable willingness to break away from the artificial rules which this century has produced on the subject of corporate power. In *Chapman v. Iron Clad Rheostat Co.*, 41 Atl. 690, the Supreme Court has incidentally expressed approval of the earlier decision in *Camden & A. R. Co. v. May's Landing, Etc., Co.*, 48 N. J. L. 530, which goes a long way towards permitting

Statutory  
Liability of  
Stockholder,  
Set-off

Power of a  
Corporation  
to Buy its  
Own Stock,  
"Ultra Vires"

**CORPORATIONS (Continued).**

recovery of damages for the breach of a so-called "*ultra vires* contract." The point actually decided in the Chapman case, however, is that, under the New Jersey corporation act, a corporation may buy its own stock for legitimate corporate purposes. An employe declined, on a contract, to repurchase his holding of stock upon the cessation of his employment. The corporation's demurrer was overruled. This satisfactory result is diametrically opposed to what was declared to be the common law rule in *Coppin v. Greenlese Co.*, 38 Ohio St. 275.

Judge Simonton, in *Tompkins Co. v. Chester Mills*, 90 Fed. 37, has made an allowance for expenses, out of the estate of an insolvent corporation, to the unsecured creditor who first began the proceedings for distribution, although, as it turned out, intervening lien creditors and bondholders exhausted the fund and left nothing but the judge's allowance for the unfortunate complainant.

The Supreme Court of Missouri, in *Exter v. Sawyer*, 47 S. W. 951, has added another decision to the group of those which recognize the salutary principle that a promoter must account for a secret profit made at the expense of stockholders, who had reposed confidence in him. The court reviews *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, and other cases. Readers who are interested in this subject will do well to read Adelbert Hamilton's article in 16 American Law Rev. 671.

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**CRIMINAL LAW.**

In *Bergman v. People*, 52 N. E. 363, the defendant went to a jeweler and stated that certain people, including himself, wished to make a wedding present, and that he wanted to take some jewelry to show such persons. The jeweler declined to deliver it into his possession unless he had security, whereupon the defendant gave an instrument purporting to guarantee the payment of whatever jewelry the defendant should buy of prosecutor for not over \$200. The defendant then got the jewelry, and promised to return it, or the money for it, within three days. The jewelry was not returned nor paid for. The representations as to the wedding present were false and made to obtain the jewelry. Held, guilty of larceny as a bailee. The court said that the guar-

**CRIMINAL LAW (Continued).**

anty was available only in case a sale was consummated, but the jewelry was never sold, and the title never passed out of the jeweler. The defendant simply had it to exhibit to others, who, like himself, contemplated buying, and converted it to his own use while such relation existed.

The propriety of allowing a jury to determine the punishment to be meted out to criminals convicted of murder has always been questioned. Yet the Supreme Court of the United States, in the case of *Winston v. United States*, 19 Sup. Ct. 245, held that a verdict of guilty "without capital punishment" may be rendered in a murder case under the Act of Congress of January 15, 1897, chap. 29, even if there are no mitigating or palliating circumstances.

**Determina-  
tion of Pun-  
ishment by  
Jury.**

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**DAMAGES.**

The Supreme Court of Vermont has again announced its adherence to the rule that no recovery can be had by a father for the burial expenses of his child, killed by the negligence of the defendant: *Trow v. Thomas*, 41 Atl. 652. The decision is in accord with the right of authority, but seems an inequitable and illogical one. If, as is conceded, the father may recover for medical expenses incurred prior to the child's death, he ought, also, to recover what is just as proximate a consequence of the wrongful act, namely, the burial expenses: See, *Cross v. Guthrie*, 2 Root, 90. The rule is a survival of the doctrine, *actio personalis moritur cum persona*. The same ruling has been extended even to the case of death by the felonious act of another: *Insurance Co. v. Brame*, 95 U. S. 754. (See note in this issue.)

**Death by  
Wrongful Act,  
Burial  
Expenses**

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**GUARANTY.**

A written agreement of guaranty, like any other such agreement, may be reformed upon clear proof that it does not express the actual intentions of both parties; the rule that mistakes of law cannot be corrected have no application to such a case: *Bank v. Mann*, 76 N. W. (Wis.) 777.

The courts have always been astute to exonerate from liability on a guaranty one who has merely proposed to guarantee without the completed contract being made. *Lamb v. Carley*, 54 N. Y. Suppl. 804, is such a

**Incomplete  
Contract**



**GUARANTY (Continued).**

case, where the incompleteness was shown by the statement "that the details would be stated more definitely when the money was sent."

**HUSBAND AND WIFE.**

Two cases arising under the Nebraska statute, authorizing divorce for extreme cruelty, whether practiced by using personal violence or by any other means, are

<p><b>Divorce, Extreme Cruelty</b></p>	<p><i>Walton v. Walton</i>, 77 N. W. (Neb.) 392, and <i>Berdolt v. Berdolt</i>, 77 N. W. (Neb.) 399. The former was a libel by the wife, charging cruelty by, among other things, calling her obscene and vile names : disregarding the unproved charge of infidelity on her part, the court held (1) that disobedience of his orders in such matters as visiting her family, whether improper or not, was not such conduct as justified him in this treatment of her—it being in no sense the natural and probable consequence of her misconduct; and (2), after criticising <i>Shaw v. Shaw</i>, 17 Conn. 189 (which follows the common law rule,—see <i>Russell v. Russell</i>, [1897] A. C. 395), that false charges of infidelity and calling of vile names in itself constitutes extreme cruelty.</p>
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In the second case, false charges of physical incompetency to perform her marital duties were held such extreme cruelty as to entitle her to a divorce upon her cross bill in a suit instituted by him upon the faith of these charges. (See note in this issue.)

The Dakota Divorce Laws which have been the cause of so much litigation in the East, were the subject of discussion in

<p><b>Divorce in Another State</b></p>	<p><i>Streitwolf v. Streitwolf</i>, 41 Atl. (N. J.) 876, Pitney, V. C., holding, in an oral opinion, that a divorce obtained in Dakota, by virtue of a <i>mala fide</i> three months' residence, was not recognized in New Jersey, and could not be a defence to a divorce proceeding instituted by the deserted wife in that state.</p>
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*Canale v. People*, 52 N. E. (Ill.) 310, gives a correct exposition of the proof required of foreign marriages. Canale was indicted for bigamy, and the prosecution proved

<p><b>Proof of Foreign Marriage</b></p>	<p>that he had gone through a marriage ceremony in Italy; while admitting that this would be presumed to have been done according to Italian law, the court, nevertheless, held that, a competent witness having testified that the marriage was absolutely void in Italy because of non-compliance with statutory requirements, the defendant should have received binding instructions.</p>
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## INSURANCE.

A curiously precise construction of the word "in" may be found in *Van Bokkelen v. Traveler's Ins. Co. of Hartford*, 54 N. Y. Suppl. 307. The defendant insured, *inter alia*, against accidental death with a further provision for double indemnity should the injuries be sustained while the insured was "riding as a passenger in any passenger conveyance." The insured went upon the platform of a passenger car while the train was running slowly; he was thrown to the ground, dragged for some distance, holding to the hand-rail or step of the platform, and then killed by falling to the road below a bridge which the train was then crossing. The court holds that the double indemnity would not be payable were the insured injured while riding outside of or upon a passenger conveyance. The platform was without the body of the car in which the passengers were usually carried; there was, therefore, in this case no double liability under the policy. The court, moreover, intimates that the death was not due to injuries sustained while the insured was even upon the train.

What would be the ruling in the case of a passenger conveyance carrying all the passengers outside? In other words, is the decision to be limited to conveyances having an interior and presumably safer place for carrying passengers? The court quotes with approval the following passage from the opinion in *Schoonmaker v. Hoyt*, 148 N. Y. 431.

"In the construction of contracts . . . the intention of the parties . . . is to be sought in the words and language employed, and if the words are free from ambiguity, and express plainly the purpose of the instrument, there is no occasion for interpretation. Contracts or statutes are to be read and understood according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation . . . If the words employed convey a definite meaning, and there is no contradiction or ambiguity in the different parts of the same instrument, then the apparent meaning of the instrument must be regarded as the one intended."

This may well be compared with the decision in *Menneiley v. Insurance Corporation*, reported in the same volume (148 N. Y. 600) and referred to in our note in this number upon *M'Glother v. Provident Mutual Accident Co.*, 89 Fed. 685.

*M'Master v. New York Life Ins. Co.*, 90 Fed. 40, contains a most elaborate argument of some propositions that are made

INSURANCE (Continued).

**Life Insurance, Annual Premiums, Forfeiture** to appear almost self evident. The Appellate Court, however, had ruled the question otherwise in an equity proceeding involving the same policy (87 Fed. 63), which constrained the court in this proceeding to enter a judgment adverse to the opinion delivered. A policy provided that it should not be in force until the first premium was paid; it was dated December 18th, but the first premium was not paid until December 26th; the policy contained a provision that thereafter the *annual premium* should be paid on December 12th; the insured died January 18th, thirteen months later, and the question was whether this was within the month's grace allowed him by the terms of the policy for the payment of the second premium. Judge Shiras considered the policy a contract for the life of the assured, subject to forfeiture for non-payment of premiums, rather than a renewable yearly contract; the burden, therefore, was on the insurer to establish the forfeiture. The terms of the policy being inconsistent, the construction most favorable to the insured was adopted, for "the construction must be against the party who prepared the contract," and "if possible, the contract must be so construed as to sustain it, and not to defeat it." The insurer had no right, consequently, to forfeit the policy for the non-payment of the second premium, and the court held that a policy once in force is not terminated by the failure to pay premiums unless the right to forfeit it is reserved.

It will be found interesting to compare this very thorough opinion with that of the Circuit Court of Appeals in 87 Fed. 63.

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MASTER AND SERVANT.

In *Di Vito v. Crage*, 55 N. Y. Suppl. 64, the servant's assumption of the risks of his employment is said to be based upon the performance by the master of the duties imposed upon him; the rule excuses the master only when the injury results from a cause which could not have reasonably been foreseen and guarded against by him.

The somewhat delicate duties of a master, with respect to a discharged servant, are set forth in *Hundley v. Louisville & N. R. Co.*, 48 S. W. (Ky.) 429. The plaintiff complained that he had been discharged from the employ of the defendant company, and that a false entry of the cause of his discharge upon the records of the company rendered it impossible for him to obtain similar

**MASTER AND SERVANT (Continued).**

employment with other companies. The court admitted his right to pursue any lawful occupation, and that it would be a legal injury to prevent him from so doing; but a demurrer to his petition was sustained on the ground that he had set forth only legal conclusions as to his damage and not the actual consequences of defendant's wrongful acts.

The Supreme Court of Indiana, in *McFarlan Carriage Co. v. Potter*, 52 N. E. 209, passed on the question of the duty of

<b>Assumption of Risk, Promise to Repair</b>	a master when a servant notifies him of a defect in machinery and the master promises to repair it. They held where the master promises to repair it, either specifically or generally, the servant does
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not assume the risk of injury from such defect by remaining at work, with knowledge thereof, for a reasonable time to allow such repairs to be made. Where, however, the promise is to repair after the completion of the work on hand, the servant assumes the risk of injury until such time by continuing at work. In this case the servant complained of a defect in a saw. The master promised to repair as soon as the present order was run out. The servant was injured in the meantime and, of course, under the above rules, could not recover.

The Supreme Court of Michigan, in *Wachsmuth v. Shaw Electric Crane Co.*, 76 N. W. 497, decided that the master is

<b>Defective Appliances, Inspection</b>	not bound to periodically inspect small tools in everyday use, in which defects may be ascertained by the servants themselves. The man who uses it must judge of its fitness. The tool in question was a hammer, but the same rule would apply to crowbars, picks, shovels, chisels, files, etc.
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**MORTGAGES.**

The usual litigation arising out of the execution of a deed as security for a loan is a bill by the grantor to redeem. In

<b>Absolute Deed as Mortgage</b>	<i>Chine v. Robbins</i> . 55 Pac. (Cal.) 150, we have such a suit by a grantee to have the deed, absolute on its face, declared a mortgage, which was done, after some doubt in the lower court as to whether in such a case, after holding the transaction to be a mortgage, a foreclosure of the mortgage could be ordered.
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**MORTGAGES (Continued).**

*Hossack v. Graham*, 55 Pac. (Wash.) 36, is a decision with which no lawyer is likely to find fault, in view of the difficulties surrounding equitable liens. A company, having executed a mortgage in the usual form, added thereto a covenant that 25 per cent. of the proceeds of the sale of all other lands of the mortgagor company (describing them) should be paid by a bank and from a sinking fund for the further securing of the mortgage debt. It was held that this was a mere personal agreement and did not constitute an equitable lien on the other lands, even as against the subsequent mortgagees, with actual notice.

**Equitable  
Mortgage.  
What  
Constitutes**

*Huzza v. Sikorski*, 76 N.W. (Wis.) 1117, decides that, where an agent of a mortgagor has been given money to pay off the mortgage, he does not thereby become the debtor of the mortgagee, so as to subject him to garnishment by the mortgagee's creditor.

**Agent of  
Mortgagee,  
Garnishment**

**MUNICIPAL CORPORATIONS.**

The Supreme Court of Louisiana, in *City of New Orleans v. Werlein*, 24 So. 232, following the well-established rule that property of a municipality, once dedicated to public use, is *extra commercia*, allowed a recovery of such property by the city, twenty years after a sale of same under an execution against the municipality, it not clearly appearing that previous to the same the public use had been abandoned or lost by non-user.

**Property,  
Non-Allen-  
ability**

**NEGLIGENCE.**

An interesting question arose in *Isaackson v. Duluth St. Ry. Co.*, 77 N. W. 433, where the rules of a street railway company imposed a greater degree of care on the motorman than the law did, and the question was whether the plaintiff could take advantage of it and treat it as the criterion of due care. Held, he could not. Special rules made for the guidance of the company's employes were not to govern, but he must rely on the general rule of law that everybody must use a reasonable degree of care to avoid causing injury to another. This is especially true where the plaintiff did not know of the rule and his conduct was not influenced by it.

**Street Rail-  
ways, Rules  
of Company  
Requiring  
Greater  
Degree of  
Care than  
the Law**

**NEGLIGENCE** (Continued).

*Chesapeake and Ohio Ry. Co. v. Perkins*, 47 S. W. 259, was an action for damages resulting from an injury received by being struck by a train while trespassing (walking) upon the railroad tracks. On the question as to what duty a railroad company owed a person who was walking along its tracks the Kentucky Court of Appeals held that the company must use reasonable care to avoid injuring him, after discovering his danger; that in cities where persons are likely to be found trespassing it must keep a lookout along its tracks, and, when discovered, must avoid hitting him even to the extent of stopping the train.

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**PARENT AND CHILD.**

The familiar rule that a child must prove an express contract to recover wages from its parent is applied to the claim of a grandchild against its grandfather's estate in *Jackson's Adm'r v. Jackson*, 31 S. E. (Va.) 78.

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**PARTNERSHIP.**

X and Y were partners. X sold out to Y, Y covenanting to pay firm debts. The firm being solvent, this transfer converted the firm property into the separate property of Y: *Ex parte Ruffin*, 6 Ves. 127. Y then formed a partnership with B into which he put the property late of the old firm. On dissolution of Y and B, Y conveys his interest in the property to B in trust for payment of debts of Y and B and debts of Y for which B was liable. A, a creditor of the old firm of X and Y, filed a bill to subject the property in the hands of B to a payment of his claim. Obviously, under *Ex parte Ruffin* (*supra*), A had no right against the property merely in virtue of the former ownership of X and Y. Nor had he rights in virtue of the terms of the conveyance from Y to B, because A's debt was not one for which B was liable. The court properly dismissed A's bill, but the reasons given are not very clear or satisfactory, the rule in *Ex parte Ruffin* not being even referred to. To the extent that there is in the opinion an intimation that a transfer of a partner's interest extinguishes the partner's equity the opinion is certainly unsound: *Wolfe v. Pringle*, 31 S. E. 605 (Supr. Ct. of App. of Virginia).

**PARTNERSHIP (Continued).**

In *Win v. Devine* (Court of Errors and Appeals of New Jersey), 41 Atl. 213, three co-owners of property brought replevin for it. As the three had once been members of a firm since dissolved they were led into the error of suing as Jacob Win and others, "trading under the firm name and style of Win & Sons." It is clear that if the defendant had filed a plea denying the existence of a partnership and the plaintiffs had accepted the issue thus tendered, the parties would have gone to trial on an immaterial point. The plaintiffs would have been in law entitled to recover because they were co-owners, but they would, nevertheless, have lost their case, because the jury could not have avoided finding a verdict for the defendant on the issue as joined. Failing to grasp this situation, the trial judge non-suited the plaintiffs on the theory that the failure to prove the partnership as alleged was a fatal variance. On appeal decision was promptly reversed, the court remarking "the impropriety of this ruling is manifest."

*George v. Benjamin*, 76 N. W. 619, recently decided by the Supreme Court of Wisconsin, represents an interesting application of the rule that a partner may sue his co-partner at law on a promise to contribute capital. The expressions cited by the court from the opinion in *Glover v. Tuck*, 24 Wend. 153, and from Collier, Part. 132, really originated with Lord Ellenborough in *Venning v. Leckie*, 13 East, 7. This is perhaps the leading case on the subject. See other authorities collected in note on p. 462, Ames's Cases on Partnership.

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**PLEADING AND PRACTICE.**

Cases under the "War Revenue" Act may be expected to pop up from time to time as the requirements of the new law shall be tested and determined in the courts. The First Department (Appellate Division) of the Supreme Court of New York has recently ruled a practical point of everyday importance. The decision was that the provisions of sections 14 and 15 of the Revenue Act of 1868, that no unstamped instruments required to be stamped shall be recorded, applies only to records pursuant to United States Statutes. Therefore a Register of Deeds must file an instrument for record under the Laws of

### PLEADING AND PRACTICE (Continued).

New York though it is not stamped. The opinion of O'Brien, J., is, that "the responsibility of seeing the proper stamp affixed rests upon the parties to the instrument . . . To hold that such a duty rested upon the register would be to constitute him a judicial instead of a ministerial officer:" *People v. Fromme*, 54 N. Y. Suppl. 833.

The Supreme Court of Missouri has decided that there is no distinction between cases to be tried by the court and those to be tried by a jury, that the right to a change of venue applies to a suit in equity in that state, under the statutes, which is as follows: "A change of venue may be awarded in any civil suit to any court of record, for any of the follow causes. First, that the judge is interested or prejudiced, or is related to either party, or has been of counsel in the cause; second, that the opposite party has an undue influence over the mind of the judge; third, that the inhabitants of the county are prejudiced against the applicant; fourth, that the opposite party has an undue influence over the inhabitants of the county:" *Walker v. Ellis*, 48 S. W. 457.

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### PRINCIPAL AND AGENT.

The liquor laws have been the occasion of many applications of the law of agency, one frequent point of which is illustrated in *Cunningham v. State*, 31 S. E. (Ga.) 585. C, at N's request, undertook to buy for him some liquor in a county where its sale was forbidden. M, the owner, upon the facts being explained to him, refused to sell on credit, as was doubtless C's hope, but delivered it to C, with instructions to bring back either the liquor or its price. He returned the price, but the court held that, although a person may be agent for both parties to a contract, yet C was not, under the circumstances, M's agent, and his conviction was set aside.

The Supreme Court of Michigan very properly decides in *Carland v. Western Union Telegraph Co.*, 76 N. W. 762, that a telegraph operator is the agent of the company in receiving over a telephone and writing a message to be transmitted by the company, in the absence of proof that the regulations of the company forbade it, and that the sender had notice of such regulations.



## PROPERTY.

A report was read before an incorporated society, and was accepted by the society. Subsequently a person not a member of the society, but who was present at the time of the report by reason of an invitation of the general public to the meeting, procured a copy of the report and used certain extracts therefrom for advertising purposes. The society filed a bill to restrain such use of the report. The answer was a dedication of it to the public, by reason of its being read in a meeting to which the public was invited. An injunction was granted: *Dental Society v. Denticura Co.*, 41 Atl. (N. J.) 672. In support of the opinion of the court, that the facts in the case did not constitute a dedication to the public, see *Tompkins v. Halleck*, 133 Mass. 32; *Palmer v. DeWitt*, 47 N.Y. 532; *Abernethy v. Hutchinson*, 3 L. J. Ch. 209; *Caird v. Sime*, 12 App. Cas. 326.

## RECEIVERS.

In different jurisdictions different rules exist as to the requirements of a bill praying for the appointment of a receiver. In Alabama a simple contract creditor of a corporation may not obtain a receiver, though the corporation has ceased to be a going concern; there must exist some recognized principle of equity jurisdiction, such as fraud: *Smith-Dimmick Lumber Co. v. Teague*, 24 So. (Ala.) 4.

## SURETYSHIP.

*Utah Bank v. Forbes*, 55 Pac. (Utah) 61, is an authority for the elementary principle that, upon payment by a surety, he is entitled to be subrogated to all rights of the creditor against the principal—as for example, in the case cited—to maintain the suit begun by the creditor against the principal on the original obligation.

## TRIAL.

The Supreme Court of Washington takes no chances when the possibility of a juror being influenced is in question. In *State v. McCormick*, 54 Pac. 764, a new trial was granted the defendant, who had been convicted of assault with intent to commit murder, on the ground that the court authorized two letters and a paper to be delivered to two jurors without the defendant's consent, notwithstanding the statement of the trial judge that



## TRIAL (Continued).

he had examined the letters before allowing them to be delivered, and had ascertained that they were from a considerable distance and had been in transit for several days, and that he had also examined the paper, and found that it contained nothing relative to the case at issue. (See note in this issue.)

## STATUTE OF LIMITATIONS.

In *Kuhl v. Chicago & N. W. Ry. Co.*, 77 N. W. 155, it was held that the statute of limitations applies to suits to recover damages for the taking of and by a railroad company under the right of eminent domain, whether the action in which such recovery is to be had is prescribed by statute or not. A contrary rule is followed in Pennsylvania: *Keller v. Ry. Co.*, 151 Pa. 67; *Ry. Co. v. Burston*, 61 Pa. 369. The principal case overrules *Tucker v. Ry. Co.*, 91 Wis. 576. It is in accord with the weight of authority: *Ry. Co. v. McCauley*, 121 Ill. 160; *Pratt v. Ry. Co.*, 72 Iowa, 249; *Lyles v. Ry. Co.*, 73 Tex. 95; *Frankel v. Jackson*, 30 Fed. 398.

## TRUSTS.

A deposited in a bank a check with unrestricted indorsement. The payor was in a distant city. The bank of deposit credited the depositor with the face value of the check. The check was lost in transmission to the payor. There was no evidence that the bank of deposit had stated to the depositor that they considered themselves merely agents for collection. The court held that the transaction amounted to a sale to the bank by the depositor, and, therefore, that questions in regard to the negligence of the bank of deposit were immaterial: *Taft v. Bank*, 52 N. E. (Mass.) 387.

A testator left property to his wife in these words: "I give all my estate to my said wife, to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to during our joint lives . . . and that when she shall no longer need the property it will be equally divided among our dear children, or their representatives." The court held that these words did not create a trust: *Aldrich v. Aldrich*, 51 N. E. (Mass.) 449.

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LIFE INSURANCE; "DEATH FROM POISON;" ACCIDENTAL SELF-POISONING OF INSURED. The case of *M'Glother v. Provident Mutual Accident Co.*, 89 Fed. 685 (Circuit Court of Appeals, Eighth Circuit, October, 1898), may prove of much importance in the law of accident insurance and it is a striking illustration of the divergence that so often exists between the rulings of the Federal and State courts.

The policy was against accident, but it expressly excepted death "from poison." The insured drank poison, thinking it a harmless medicine, and died from its effects.

The efforts made by the courts to relieve against the operation of such exceptions as this may be observed in Biddle on Insurance, Sec. 805, *et seq.*, or in the authorities cited in the opinions in the

present case. *Paul v. Ins. Co.*, 112 N. Y. 472 (1889), is the leading case in the State courts and it has been followed in many jurisdictions as establishing a distinction between "death from poison" and "death from taking poison" or "death by gas" and "death by inhaling gas." The word "taking" or "inhaling" is held to imply a conscious and intentional act; in the language of the opinion in *Paul v. Ins. Co.*, "If the exception is to cover all cases where death is caused by the presence of gas, there would be no reason for using the word 'inhale.'" Again, in a very recent case, *Fidelity and Casualty Co. v. Waterman*, 161 Ill. 635 (1896), the court speaks of "a voluntary or intelligent act, as distinguished from an involuntary and unconscious act."

The possibilities of this construction of accident policies are illustrated in *Menneiley v. Assurance Corp.*, 148 N. Y. 600 (1896), where it was held that a death from accidentally inhaling gas while sleeping is not a death "resulting from poison, or anything accidentally or otherwise taken, administered, absorbed or inhaled." Sanborn, Cir. J., comments on this very severely in the present case and asks pertinently: "If gas is unintentionally and unconsciously taken or inhaled, why is it not 'accidentally' taken or inhaled? If it is not, then why is it not 'otherwise' taken or inhaled? And how can gas get into the system in any other way than by being 'accidentally or otherwise taken, administered, absorbed, or inhaled?'" The construction given this clause, he declares, "appears to be cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words it contains in their plain, ordinary and popular sense," and the path followed by these decisions "is so narrow, tortuous and indistinct that we should hesitate long to follow it." He had already shown that the rule "*Noscitur a sociis*" was inapplicable. The exception in this policy covered also death resulting from fits of vertigo and somnambulism; it could not be that this meant only cases where the deceased intentionally had the fits or purposely, voluntarily and consciously walked in his sleep.

While these last considerations tend to distinguish this case from *Paul v. Ins. Co.* and others of that class, the decision is based on broader grounds:

"There is no just reason why parties or courts should be ingenious or eager to add to, subtract from, or to search out curious and hidden meanings in the plain terms of their compact. Contracts of insurance are not made by or for casuists or sophists, and the obvious meaning of their plain terms to the business and professional men who make and use them must not be discarded for some curious and hidden interpretation that is to be reached only by a long train of acute and ingenious reasoning."

"Death by poison" is held to be an unambiguous phrase which raises no question or doubt of its meaning; the insurer is therefore exempt from liability for death attributable to poison.

From this conclusion Thayer, Cir. J., dissents. He invokes the

doctrine of *stare decisis* and cites many cases from the courts of New York, Pennsylvania and Illinois to show how well established is the rule of *Paul v. Ins. Co.* To the attempted distinction between "death from poison" and "death by taking poison" he attaches no weight; instead, he assimilates these exceptions in a policy to an exception from liability should the insured "die by his own hand." In such a case, he points out, the intelligence to understand the moral character and the effect of the act of self-destruction has been made the criterion: *Ins. Co. v. Terry*, 15 Wall. 580 (1872). Finally, he relies upon the rule requiring a policy to be construed most strongly against the insurer.

The importance of this case is manifest. Apparently it was of first impression in a Circuit Court of Appeals; no Federal authorities are cited in either opinion except to support the construction put upon "die by his own hand." How wide a departure this decision marks from the course of reasoning pursued in the cases following *Paul v. Ins. Co.* may be seen, for instance, in *Pickett v. Ins. Co.*, 144 Pa. 79 (1891), a case relied upon by Judge Thayer. The Supreme Court of Pennsylvania, in *Pollock v. Accident Association*, 102 Pa. 230 (1883), upon a state of facts substantially the same as in the *M' Glother* case, had enforced a clause in a policy exempting the company from liability for death by the *taking of poison*. Notwithstanding this, in *Pickett v. Ins. Co.*, the court, after a re-argument before the full Bench, adopted the rule of *Paul v. Ins. Co.* (then recently decided) and permitted a recovery for a death from asphyxiation by carbonic acid in a well. The policy read "death from inhalation of gas." The distinction is drawn that the poison in the Pollock case was voluntarily and intentionally taken by the deceased, while here the gas worked a *violent death*. We may point out, however, that although the liquid was swallowed intentionally its nature was unknown and it was not taken *as a poison*; the facts of the earlier case come, therefore, within the rule of *Paul v. Ins. Co.* and the attempted distinction cannot readily be understood.

It is true, as Judge Sanborn shows, that these authorities in the State courts do not cover this precise point, but the distinction between "death by poison" and "death from taking poison," upon which they proceed, is disregarded both in the opinion of the court and in the dissenting opinion. The question at issue is resolved solely into this: Is a death resulting from purely accidental poisoning covered by such exceptions or does the policy refer only to cases where the insured's own volition contributed to the poisoning? In other words, should the rule be like that in cases of suicide?

In effect the evidence of the parties' intention relied upon by the State courts is excluded, and the underlying question of substantive law is decided upon a principle broad enough to cover the cases decided by the State courts in favor of the insured.

This same principle had already been applied in *Richardson v.*

*Travelers' Ins. Co.*, 46 Fed. 843 (Circuit Court, M. D. Illinois, 1891), where Blodgett, J., held that asphyxiation in one's room by escaping gas was covered by an exception of "death resulting from *inhaling* gas;" *i. e.*, the decision was similar to that in *Pollock v. Accident Association*. The plaintiff relied upon *Paul v. Ins. Co.*, but the court thought the reasoning of that case unsatisfactory and the terms of the policy too clear to require construction. Moreover, the argument that the exception related only to poisoning which involved the insured's volition, was disapproved because of the difficulty in procuring evidence to show accident or suicidal intent.

On the other hand, the Circuit Courts have followed *Paul v. Ins. Co.* in several cases, such as *Westmoreland v. Preferred Accident Ins. Co.*, 75 Fed. 244 (1896), and *Lowenstein v. Fidelity and Casualty Co.*, 88 Fed. 474 (1898), where the word "inhaled" or "taken" was found in the policy. The latter case, in the Western District of Missouri, is particularly interesting since it had already been decided, but was not yet reported, when the decision was rendered in *M' Glother v. Accident Co.* The opinion is by Philips, D. J. He refers to *Paul v. Ins. Co.*, and to *Richardson v. Ins. Co.*, and then comments on the recent case of *Early v. Ins. Co.*, 71 N.W. (Mich.) 500 (1898). This decision he thinks "hardly germane" to the facts before him, as the policy read "death by poison"—a difference of language upon which the Michigan court had dwelt to distinguish the case from *Paul v. Ins. Co.* Judge Philips approves of this distinction and says, "it was properly held that 'death by poison' included any and every manner of poison, whether intentionally or unintentionally, consciously or unconsciously, taken." That is to say, he would have decided *M' Glother v. Ins. Co.*, as did Judge Sanborn, though on narrower grounds.

Judge Philips then reviews the futile efforts in New York to have the rule of *Paul v. Ins. Co.* reconsidered and cites cases following it in other States. In one of the latter (*Casualty Co. v. Waterman*, 161 Illinois, 632, 1896), he points out a very reasonable ground suggested for following this rule; the Casualty Company was the defendant in several of the later cases and after the question had been adjudicated in the courts of its own State, the company must be presumed to have had this construction in mind when it continued to issue policies in this form. A similar result, Judge Philips shows in conclusion, had been reached in *Manufacturing Co. v. Jones*, 66 Fed. 124, construing a contract to subscribe for stock, and by Judge Taft in *Indemnity Co. v. Dorgan*, 58 Fed. 956.

The learned judge's treatment of the phrase "or otherwise" calls for notice. The language in the policy is: ". . . injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." "Or otherwise," he holds, cannot qualify the *act of inhaling*, but is to be read in connection with "accidental;" "it means an injury of

a kindred character, and would cover an intentional taking as well as an accidental taking." Again, he says, if the purpose of adding this phrase was to escape the effect of the ruling in the *Paul* case, "it was a concealed purpose, not apparent to the ordinary mind, and not at all calculated to carry to the insured even a suggestion that it was intended to say by this policy that the company would not answer for liability resulting from inhaling gas or other poisonous substances, whether taken voluntarily and consciously or involuntarily and unconsciously." Yet we may well ask ourselves whether the insertion of these additional words might not indicate an intention to effect another result. "Accidentally" would, of course, be specified, for the policy was against accident and "or otherwise," in ordinary English is simply "by other means." The two would, therefore, include all possible means, the one which would first suggest itself being mentioned to show expressly that it was included. The Century Dictionary, quoted by Judge Philips, says only that in law, "'or otherwise,' when used as a general phrase following an enumeration of particulars, is *commonly* interpreted in a restricted sense as referring to such other matters as are kindred to the classes before mentioned." But the parties had just used "or otherwise" in another than this restricted sense, for they spoke of "injuries, fatal or otherwise." Injuries are necessarily fatal or non-fatal, *i. e.*, they are in two classes mutually exclusive. Why would not the more familiar sense of the phrase be quite as proper in this place as the artificial one adopted by the court?

The Circuit Court of Appeals have not as yet passed upon a policy reading "inhaled or taken" but as we have seen no effect was given these words in *M'Glother v. Provident Co.* The operations of accident insurance companies are generally wide-reaching and often it must happen, if this case be followed, that the insurers can bring their more important claims before a Federal court and escape a liability which would be inevitable in the courts of the State where the policy-holders resided. Be this as it may, it is a satisfaction to have the law expounded with such lucidity and vigor as Judge Sanborn has displayed in his opinion and to see the plain words of a business contract given their natural meaning.

*Erskine Hazard Dickson.*

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CREATION OF TRUST; ASSIGNMENT OF CHOSE IN ACTION. A woman had on deposit in a savings bank a considerable sum of money. She expressed to the teller of the bank a desire to put the deposit in the name of her two sisters and herself, her object being to enable her sisters to obtain the deposit on her death without probate proceedings. The teller informed her that if she did as she proposed, the money could be drawn out by her sisters during her life. She replied that she had confidence in them. Her request was then granted, the names of the two sisters were added to the



account in the ledger of the bank, and also posted in the deposit book. The depositor informed the sisters of what she had done, stating her desire to provide for them on her death. She subsequently drew out part of the deposit, but deposited other sums so that the total amount of the deposit at the time of her death was more than at the time the account was in the three names. The executor under her will and the two sisters claimed the deposit. The court upheld the right of the sisters, on the ground that while the transaction did not amount to a gift *inter vivos* or *mortis causa*, it did amount to a creation of trust by the depositor in the bank, and the acceptance of the trust by the bank: *Booth v. Oakland Bank*, 54 Pac. 320.

For this theory of the result of the transaction there is some authority. Schouler, in his work on Personal Property, Vol. II, Sec. 78, regards a deposit of money in another's name as a declaration of trust, while in this case the court can point to several authorities sustaining such a proposition, as, *Bosdel v. Locke*, 52 N. H. 238 (1872); *Institution v. Hathorn*, 88 Me. 122 (1895); *Martin v. Flunk*, 75 N. Y. 134 (1878); *Mabie v. Bailey*, 95 N. Y. 206 (1884); *Cunningham v. Davenport*, 147 N. Y. 43 (1898); *Gerrish v. Institution*, 128 Mass. 159 (1880). Where, however, is the declaration of trust? Deposit money in a bank. The bank is a debtor to the amount of the deposit, not a trustee of the money. The mere agreement of the bank to pay this money to some one else does not make the bank any more or less a debtor for the sum than it was before the agreement was made. Neither the original depositor nor the persons to whom he or she has directed the money to be paid could, on the failure of the bank, claim priority for the deposit as a trust fund as against the general creditors. The bank, therefore, in such cases, never becomes a trustee. Neither, in the particular case under discussion, did the depositor declare herself a trustee for the bank's obligation to her in favor of her sisters. She intended to make a gift of some kind, the sisters being volunteers. If the intended gift was not completely executed, it is now an elementary principle that the courts will not give effect to the incompleting gift by holding the donor or her representative trustee for the volunteer.

If we cannot support the decision on the theory advanced by the Supreme Court of California, can it be supported on any other theory? It is clear that the transaction amounted to a gift *inter vivos* or it did not amount to anything. If one makes a deposit in a bank in the name of another, though that other may not know of the deposit, the title to the bank's obligation is in the volunteer: *Howard v. Windrim Bank*, 40 Vt. 597 (1868). At least this is the general rule in this country. There would seem to be no objection to regarding the assignment of the obligation of the bank to a depositor as complete whether the depositor directs the bank to place the deposit in the name of a third person and the bank does as directed. If this last is correct, the only difficulty in the case in

California is that the intention of the women was to retain full power over the deposit. Her first intention was not to give her sisters any interest till her death. When told that the method proposed by her would result in giving her sisters power over the deposit during her life, she acquiesced. The fact that the reason for this acquiescence was her confidence that her sisters would not exercise the right during her life does not seem to be material. She consciously attempted to create a joint ownership during life, with a condition that should she die before her sisters, her rights should pass to them and the whole property be then vested in them absolutely. Such a settlement of personal property is perfectly legal, and while we do not know of a case where one has conveyed a joint right of property with himself to another, with a right of survivorship in that other, without the intervention in the conveyance of a trustee to whom the property is first conveyed, we know of no reason why it should not be done.

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DIVORCE ; CRUEL AND INHUMAN TREATMENT. In the case of *Walton v. Walton*, in the Supreme Court of Nebraska, 77 N. W. 392, (Dec. 8, 1898), an action by the wife for divorce, it was alleged that the husband had used vile and opprobrious epithets toward her ; that he had called her a bad woman, and accused her of committing adultery. The court held that a false charge of adultery made by a husband against his wife, and calling her vile and opprobrious names, was sufficient to constitute extreme cruelty according to the statute.

While it is admitted that the tendency has been, especially of late years, to extend the doctrine of cruelty as ground for divorce, both in this country and in England, by the weight of authority, the abuse and inhuman treatment must be such as renders cohabitation unsafe, or is likely to be attended with injury to the person or the health of the party. The test must be danger of life, limb or health. In *Evans v. Evans*, 1 Hagg Const. 35 (1790), it was said : " Mere austerity of temper, petulance of manners, rudeness of language, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty." In *Russell v. Russell*, [1897] A. C. 395, a wife had charged her husband with committing an unnatural crime, and insisted in the charge publicly, after admitting that she had not an honest belief in the charge. The court held that such ill-treatment was no ground for divorce, saying there must be personal ill-treatment, such as blows or bodily injury of any kind, or threats of such description as would reasonably excite, in a mind of ordinary firmness, a fear of personal violence. Words, however abusive, offensive, harsh, obscene or vulgar, will not amount to extreme cruelty unless they be accompanied by some act indicating personal injury to life or health of the party. This principle is established by many cases. In *Cheatham v. Cheatham*, 10 Mo. 296 (1848), charges of infidelity do not constitute such cruelty as to entitle a



person to divorce. In *Shaw v. Shaw*, 17 Conn. 189 (1845), the husband had charged the wife with adultery and used vulgar, obscene and harsh language, which would wound the feelings. It was held that these, unaccompanied with any act indicating personal violence, will not constitute extreme cruelty. To the same effect was *Detrick's Appeal*, 117 Pa. 452 (1888), where the court said: "There must have been actual personal violence, or reasonable apprehension of it, or such a course of treatment as endangered her life or health and rendered cohabitation unsafe." In *Blair v. Blair*, 76 N.W. (Iowa) 700 (1898), the husband had charged the wife with adultery, but the court held that this treatment was not such as to endanger life, hence not sufficient cruelty as would entitle the wife to divorce. But any ill-treatment, or the use of such language as produces mental suffering of sufficient degree as to injure the health, will be sufficient cruelty. In *Jefferson v. Jefferson*, 168 Mass. 456 (1897), the husband used vile and vulgar language to his wife when she was pregnant, and this was considered such extreme cruelty as to be injurious to health and sufficient ground for divorce.

The thought that pervades all the decisions is not to lay down any hard and fast rule as to legal cruelty, but to give protection to the complainant against actual or apprehended violence, physical ill-treatment or injury to health.

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MEASURE OF DAMAGES; RIGHT TO RECOVER FOR BURIAL EXPENSES WHERE DEATH RESULTS FROM WRONGFUL ACT. *Trow v. Thomas*, 41 Atl. 652 (July 18, 1898). In this case the Supreme Court of Vermont decided that a parent could not recover expenses incurred in burying a minor child who had been killed through the defendant's negligence. The decision was based solely on the authority of a previous case, *Sherman v. Johnson*, 58 Vt. 40, 2 Atl. 707 (1886), but the court questioned the truth of the principle of law therein enunciated. In *Sherman v. Johnson* it was decided that where a minor son had been killed by the wrongful act of the defendant, the child's father could not recover damages for the loss of his services from the time of his death to his majority. In reaching this conclusion the court relied exclusively on the common law rule "*Actio personalis moritur cum persona*" and overlooked the Acts of Assembly, 1847, No. 2 and 1849, No. 8, Revised Laws of Vermont, 2134, 2135 and 2138, 2139. The cases of *Needham, Adm'nx v. Grand Trunk R. R.*, 38 Vt. 294 (1865), and *Legg, Adm'nx v. Britton*, 64 Vt. 652 (1890), interpreting these statutes to have abrogated the common law doctrine of non-survival of actions, and creating rights similar to those given by Lord Campbell's Act (1846), 9 and 10 Victoria, c. 93, also seemed to have escaped the notice of the court.

Before the case of *Trow v. Thomas*, the right to recover damages for burial expenses where death resulted from another's negligence

had never arisen in the courts of Vermont and it is fair to presume from the language of the opinion, that had the court not felt bound to follow the decision of *Sherman v. Johnson*, which was stated to be analagous to the question under consideration, a recovery for such expenses might have been allowed.

At common law the death of a human being afforded no ground for an action of damages, although where death was not instantaneous, the executor or administrator of the deceased might recover for the pain and suffering experienced and such expenses as nursing and medical attendance incurred prior to death: *Finlay v. Chair-nay*, 20 Q. B. Div. 494, 502 (1888); *Osborn v. Gillett*, L. R. 8 Ex. 88 (1873). To remedy this hardship Lord Campbell's Act was passed, providing that in addition to the common law right in favor of the executor or administrator there might be a recovery for such damages as were occasioned to the members of the decedent's family by reason of the deprivation of his services. Only such damages can be recovered, however, as occur on account of the decedent not being alive to support his family, and, therefore, it has been uniformly held that damages which are purely incidental to death, such as mental pain and anguish, loss of society and affection are not recoverable: *Blake v. Midland Ry. Co.*, 18 A. B. 93 (1852); *Pym v. Great Northern Ry. Co.*, 4 B. & S. 396 (1863); *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555 (1868); *Rowly v. London R. R. Co.*, L. R. 8 Ex. 221 (1873).

Nor can funeral expenses be recovered, for they are not incurred *qua* the decedent's family is deprived of his support: *Dalton v. S. E. R. R. Co.*, 4 C. B. N. S. 296 (1858); *Boulter v. Webster*, 73 Weekly Reporter, 289 (1865).

Lord Campbell's Act, being abrogative of the common law, has received a strict interpretation from the English courts and only such damages can be recovered in an action where death results from another's wrongful act as are explicitly granted by the Act. In the United States the decisions of the various state courts in reference to the right to recover damages for death occasioned by another's negligence are not in accord, but generally a more liberal view obtains than in England. Where statutes, similar to Lord Campbell's Act, have not been adopted, the common law rule prevails, and death affords no ground for an action of damages. In those states where by statutory right an action may be maintained for damages resulting from death, funeral expenses are recoverable when they have been incurred by those entitled to bring such action: *Penna. Co. v. Lily*, 73 Ind. 252 (1881); *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275 (1896); *Cleveland R. R. Co. v. Rowan*, 66 Pa. 393 (1870); *Murphy v. New York, Etc., R. R. Co.*, 88 N. Y. 445 (1882); *Petrie v. Columbia, Etc., R. R. Co.* 39 S. Car. 303 (1888). In several states, however, the English doctrine is followed, and burial expenses are disallowed on the ground that only such damages are recoverable as result from the loss of the decedent as a wage earner: *Holland v. Brown*, 13

Sawyer (U. S.), 284, 35 Fed. 43 (1888); *St. Louis, Etc.*, R. R. Co. v. *Sweet*, 63 Ark. 563 (1897).

Curiously enough, the courts of the various states almost invariably deny the right of compensation for wounded feelings, mental pain and anguish, and loss of society, in accordance with the English decisions: *Penna. Co. v. Lily*, 73 Ind. 252 (1881); *Penna. R. Co. v. Butler*, 57 Pa. 335 (1868); *Dorman v. Broadway R. Co.*, 1 N. Y. Suppl. 334 (1888); *Parsons v. Missouri, Pac. R. Co.*, 94 Mo. 286 (1887); Am. and Eng. Ency. of Law (2d Ed.) Vol. 8, p. 926. The question, at bottom, is one of statutory interpretation. The English courts give Lord Campbell's Act a strict construction, it being abrogative of the common law. In America the statutes are either more liberal in their terms or have been more liberally construed on the ground that the wrongdoer is responsible for the natural and immediate consequences of his act.

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## BOOK REVIEWS.

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THE LIFE OF DAVID DUDLEY FIELD. By HENRY M. FIELD. New York: Charles Scribner's Sons. 1898.

The author of this work is not a lawyer, and has not meant to write a biography illustrative of the successful man of law, or particularly helpful to the legal profession. Being one of the late D. D. Field's brothers, he possesses an intimate knowledge of the personality of the noble character which he fondly delineates, but he has not drawn for us the highly desirable but rare picture of the great lawyer in his office, or busied otherwise about his active duties. There have been many lawyers, the daily record of whose lives would almost equal in interest that of Dr. Johnson's life, and it is to be regretted that among their fellow lawyers closely associated with them some Boswells have not been found. This regret is thrust upon us in every chapter of the biography. We have reminiscences of the Duke of Wellington, of Daniel O'Connell and of dozens of men foremost in every walk of life, down to Lord Russell, the present Chief Justice of England, we have glimpses of Australia and Hong Kong, we have historical and family sketches, but we look in vain for a practical insight into the long hours which Field devoted to his myriad clients or to his life-work, the Codes.

Perhaps this will not cause so much disappointment as if Field had been like the leaders of the bar to-day. He was not one after whom the rising advocate of the modern school chooses to pattern. Can a single man, approaching him in ability, be found now who would be willing to sacrifice a large share of his time during eighteen years for the reform and codification of law, and to push his task to completion in spite of criticism and hindrance from bench and bar, and at an expense of many thousands of dollars? This is

what Field accomplished, and his early discouragements and failures only accentuated his final triumph. When he died, laws, as codified by him, were administered to over forty millions of his fellow-countrymen, and some of them had travelled as far as India and other distant possessions of England. In fact, until near the time of his death, he was more renowned in England than at home, owing to the bitter controversies which his so-called innovations aroused.

These controversies showed him to the world as a hard struggler, and, taken with his determined refusal to support any political party or any measure a moment longer than he thought right, laid him open to the charge of being harsh and unfeeling. His brother's book will serve to vindicate him. Undoubtedly the keynote of his character was his unflinching justice, but he understood what mercy and charity are, too. This is plain from an act of secret beneficence done to one of Chief Justice Taney's daughters, left penniless when Taney died. Although Field had never seen the daughter at all, and had never seen the father off the bench, he gave his bond to pay \$500 a year for her support, and remitted that amount to her from 1873 till her death in 1891.

Field's love of justice stands out sharp. He voted for Hayes in 1876, but afterwards went to Congress especially to have Tilden declared President. He fought against slavery, and, his biographer claims, brought about Lincoln's first nomination for President, yet after the war he strongly urged full recognition of the Southern States, and abolition of martial law, military rule and the Test oaths. His natural inclinations and his work as codifier gave him an unbiased, judicial frame of mind. As, on the one side, he argued against an overstrained interpretation of States' Rights, so, on the other side, he argued against the attempts to nullify them entirely.

This desire to promote justice amongst men and his interest in codification throughout the world led him to formulate a code of international law, and to take a prominent part in international peace congresses and movements for universal disarmament and arbitration. He believed that law and order underlie the whole universe, and that "Justice is the greatest interest of man upon earth;" and his long and interesting life may be summed up in the words of the late Lord Cairns, Chancellor of England, who said that, "He had done more for the reform of the law than any other man living."

*J. J. S.*

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A TREATISE ON THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS, as administered in England and in the United State of America. By CHARLES FISK BEACH. St. Louis: Central Law Journal Company. 1898.

In these days of giant corporations or combinations to develop

or control the industrial or commercial business of the country, no legal questions are of more live interest than those relating to "Trusts."

The importance of, and interest taken in, the same is evidenced by the constant efforts of Congress and the various State Legislatures to control the subject by laws which will be successful in both accomplishing the object of the legislative body and at the same time meeting with the approbation of the courts.

Surely no questions before the courts are of more interest from a practical standpoint than those relating to conspiracies in restraint of trade, trades unions and labor organizations, industrial trusts, combinations of railway companies and anti-trust legislation. Mr. Beach has given us a work on these subjects which treats them in a clear, intelligent and judicial manner, with numerous citations on all subjects involved, together with a comprehensive review of all statutory enactments on trusts by Congress and the Legislatures of thirty-one states. The cases cited are the very latest decisions in their respective jurisdictions and the book is thoroughly up to date. It cannot fail to become a hand-book upon the subjects of which it treats.

*H. W. M.*

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A MANUAL OF COMMERCIAL LAW. By EDWARD W. SPENCER, of the Milwaukee Bar. Indianapolis and Kansas City: The Bowen-Merrill Company. 1898.

In his preface the author declares it his purpose to state in a clear and simple way such elementary rules and principles as are most important to business men and to present a book for general readers and for schools and colleges where business branches are taught.

The mechanical part of the book is excellent and the headings of the sections into which it is divided are in heavy black type and easily indicate the matter under discussion. There are about 550 pages and a full index. It is handy and well printed. No cases are cited, but at the end of some of the chapters reference is made to text books including the topics embraced in the chapters. It is scarcely practicable in a brief review where so many matters are treated, to mention any in much detail.

The author commences by defining law and legal rights, and then takes up contracts, stating the doctrines of consideration and the rules of offer and acceptance and other principles applicable to contracts generally. This portion of the work is needful to students, but may well need the aid of a teacher. The chapters on negotiable instruments, agency, partnership, sales of personal property, carriers and shipping are admirable and contain much information valuable to business men. Perhaps this may be said of the chapters on insurance and landlord and tenant. But the business man could scarcely rely upon a correct understanding of the nice questions of real property which must contain many technical words explained,

but not to be remembered, or the laws relating to corporations which, being almost purely statutory, vary so greatly in the different jurisdictions.

Appreciating the number of subjects to be covered the author has devoted himself to those questions which are most practical and necessary to his readers and what is stated is accurately stated. It is a full and faithful enumeration of the general principles.

The style is generally clear and simple. This is no indication that it has not cost the author much time and hard work. A book which is most easily understood and free from technical phrases may no less have required the most time and severest thought.

On the whole he has displayed considerable ability, and the work readily recommends itself to those for whom it was intended.

*H. H. B.*

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**THE UNITED STATES INTERNAL REVENUE LAWS, ANNOTATED.** By MARK ASH and WILLIAM ASH. New York: Baker, Voorhis & Co. 1898.

The authors have aimed to comprehend in this volume all the Federal Statute law now in force concerning internal revenue, supplemented with references to State and Federal adjudications, regulations of the Commissioner of Internal Revenue, and rulings of the bureaus of the Secretary of the Treasury and the Attorney-General. Containing as it does the fullest annotation of the War Revenue Law of 1898 we have yet seen, the compilation will prove of value not only to the legal profession, but to Federal officials and business men as well. Especial attention has been paid to gathering together official expressions of executive officers acting under the Statutes, and in view of the importance of these in discovering exemptions from taxes, and in determining possible liability for penalties or forfeitures, this should prove not the least useful portion of the book.

As throwing light on the meaning of the Law of '98, all the cases arising under former war revenue acts have been collected, together with the conflicting authorities on the validity of unstamped instruments, and their admissibility in evidence according to the forum where the question arose. The references to the regulations and rulings of the Internal Revenue Department since June 13th last also seem very complete.

Cross references from section to section and a full index add to the usefulness of the book.

*C. H. H.*

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**RULES, FORMS AND GENERAL ORDERS IN BANKRUPTCY.** By WM. MILLER COLLIER. Albany: Matthew Bender. 1899.

This work, as the author explains in his preface, is intended as supplementary to his recently published book on Bankruptcy and



consists of a compilation of (1) The Rules in Equity of the United States Courts ; (2) General Orders in Bankruptcy ; and (3) Official Forms in Bankruptcy. Each division is separately indexed with numerous cross-references in a manner which makes it valuable as a handy reference volume. The General Orders in Bankruptcy are copiously annotated, and though frequent mention is made of "Collier on Bankruptcy," the treatment does not detract from its value as a separate work. The set of forms covers the entire field of Bankruptcy practice and will, no doubt, be welcomed by most practitioners.

O. S.

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OUTLINES OF THE LAW OF TORTS. By RICHARD RINGWOOD, M.A.  
London : Stevens & Haynes. 1898.

"Outlines of the Law of Torts" is the unpretentious title of Mr. Ringwood's work on that important subject ; its third edition has just been published. The basis of the work was a series of lectures delivered by the author before the students of the Law Institution of London. These lectures, as the work itself indicates, were based entirely on the numerous cases relating to torts ; in fact, the author takes most of his definitions entirely from judicial opinions in the cases cited.

We regret that Mr. Ringwood has not seen fit to amplify his work. It contains, however, digests of many important cases and of all the Victorian statutes bearing on the subject, such as the Workmen's Compensation Act and the Employer's Liability Act. If the work is to be but a mere outline, we think it would be well for the author to devote more space to the general subject of torts, and we respectfully suggest that a case should not be cited with the reporter's name and "American" in brackets, as the American reports are now the reports of some fifty jurisdictions.

The reason for the present edition is found in the judgment of the House of Lords in the recent case of *Allen v. Flood*, [1898] App. Cas. 1, and the no less important and numerous body of cases and statutes on this branch of the law. The author has also paid greater attention to the valuable judgments of the Irish courts.

J. M. D.

## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**A COMPENDIUM OF INSANITY.** By JOHN B. CHAPIN, M.D., LL.D.  
Physician-in-chief, Pennsylvania Hospital for the Insane; illustrated.  
Philadelphia: W. B. Saunders. 1898.

**PRINCIPLES OF CONSTITUTIONAL LAW.** By THOMAS M. COOLEY.  
Boston: Little, Brown & Co. 1898.

**COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.** By PRENTICE  
& EGAN. Chicago: Callaghan & Co. 1898.

**A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE.** By JAMES  
BRADLEY THAYER, LL.D. Boston: Little, Brown & Co. 1898.

**BOUVIER'S LAW DICTIONARY.** Revised by FRANCES RAWLE, Esq.  
Vol. II. Boston: Boston Book Co. 1898.

**THE LAW OF BUILDING AND LOAN ASSOCIATIONS.** By WILLIAM W.  
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## ROGER BROOKE TANEY.\*

It is a remarkable fact that during the one hundred and eleven years since the adoption of the Constitution, the Supreme Court of the United States has been presided over by but seven men: John Jay, John Rutledge, Oliver Ellsworth, John Marshall, Roger Brooke Taney, Salmon P. Chase, Morrison R. Waite and Melville W. Fuller.

All of these were men of force, of learning, and exalted virtue, but the fame of some of them was won elsewhere than in the law.

Jay, Ellsworth, Rutledge were among the founders of the Republic. Chase's reputation is based as much, perhaps, upon his consummate knowledge of finance and his ability in managing the Treasury during our great Civil War, as upon his decisions as a judge.

Of Waite it may be sufficient to say that he held the scales of justice with an even and a steady hand and won the entire respect of his fellow-citizens and of the profession which he adorned, during his entire term.

\*A paper read before the Law School of Dickinson College, March 10, 1899.

The record of Chief Justice Fuller is not made up, but it may be well believed that he will worthily maintain the traditions of his office. The two men whose fame rests exclusively upon their performance of duty as Chief Justice of the United States, whose names come spontaneously to the mind whenever that great tribunal is mentioned, are Marshall and Taney. Marshall had been a soldier of the Revolutionary War, a distinguished member of Congress and a diplomatist before he was appointed to the Chief Justiceship by President Washington, whose historian he was. As Lord Mansfield may be said to have been the father of modern commercial law, as the names of Erskine and Scarlett will always be associated with the particular combination of learning and practical knowledge of human nature joined to the art of expression, which constitutes what is known as the jury lawyer, as the name of Lord Selborne will go down to history as the man who moulded that great measure of legal reform, the Judicature Act in England, so the name of Marshall will be forever known as the creator of constitutional law in the United States.

All written constitutions are codes; and because of the infirmity of human language, it is not possible to formulate any code in the interpretation of which controversies may not arise.

To you, as students of law, this is a trueism; and the familiar example of the Statute of Frauds, every line of which is said to have cost a subsidy to interpret, is cited to point the moral. It could not be expected that the Constitution of the United States would be free from obscurity, lucid as the language is; it could not be expected that the minds of those who formed it could have foreseen every case to which it was likely to be applied, precient as their minds were; and so it came to pass that, when in 1789 the discordant governments of the different states of the confederacy became a nation, and as years passed the young Republic grew, questions continually arose requiring an interpretation of the Constitution, and the Supreme Court was the only tribunal whose judgment upon them was final.

Under the masterful leadership of Marshall, who penned many of its decisions and who gave tone to the entire court, a body of constitutional law had been formed before his death in 1835, the importance of which it is impossible to measure. Its far-reaching effects were to consolidate the Republic, to give to the central government those attributes of sovereignty, without which it would have been impossible for it to exist, and to create a class of constitutional thinkers whose influence will be felt so long as the nation endures.

It is of Marshall's great successor, Chief Justice Taney, I intend to speak to you. I have been led to think that the story of his career would be of special interest because he was a graduate, and so far as an exalted position could make him, the greatest graduate of this ancient college. It will be for you to decide, when you have measured his character by his works, whether it cannot be said of him also that he was in morals equally as great as in intellect.

I approach the consideration of Chief Justice Taney's career with some hesitation, first, because I am in no way sure that I cast any additional light upon it, or illustrate it by facts that have not been already made known. His life has been written by his friend Samuel Tyler. His decisions have been carefully reviewed by that eminent lawyer, George W. Biddle, of the Philadelphia Bar, whose well-rounded career was recently closed, and an eloquent and able paper was read before the American Bar Association by Clarkson N. Potter of New York at the Session of 1882, which did full justice to his character and attainments. Besides this literature, we have Flanders and Van Santvoord's lives, and the brief, but able sketch in Hampton L. Carson's History of the Supreme Court of the United States.

Notwithstanding the fact that in his early manhood and in his old age, Taney's name was the very storm centre of heated controversy; and notwithstanding all that has been written of him, I doubt whether sufficient interest has been felt in these recent years to study his career, and my belief in its importance, by reason of his attitude on great constitutional questions, one of which required a bloody war for its final settle-

ment, together with the appropriateness, as it seemed to me, of this subject in an address before the Law School of Dickinson College, must be my excuse, if any be needed, for the selection I have made.

On the 17th of March, 1777, in Calvert County in the State of Maryland, Taney was born, the son of Michael of that name, a land-owner on the Patuxent River. His forefathers were among the early emigrants to Maryland. They were Roman Catholics. Although we are accustomed to associate the communities that settled Maryland and Pennsylvania with broad religious toleration, and although such was the intention of the founders of both communities, yet in Maryland, after the accession of William and Mary, severe penal laws were enacted, and every Roman Catholic was prohibited from teaching a school in the province. The education of children in this faith, therefore, was obtained with difficulty either abroad or privately in their families. So it happened that the father had graduated from the famous Jesuits' College of St. Omer's.

He married, in the year of 1770, Monica Brooke, the daughter of another planter of Maryland. Roger Brooke was one of seven children of this union, being the third child and the second son.

The Revolution having removed all difficulty on the score of religion and the constitution in the State of Maryland, in 1776, having placed all persons professing the Christian religion on an equal footing, the child was sent to a public school and then put under the charge of a private tutor, and thus prepared to enter Dickinson College. In his autobiography he describes his journey, after the spring vacation in 1792, to reach Carlisle:

“ We embarked on board of one of the schooners employed in transporting produce and goods between the Patuxent River and Baltimore, and, owing to unfavorable winds, it was a week before we reached our port of destination ; and, as there was no stage or any other public conveyance between Baltimore and Carlisle, we were obliged to stay at an inn until we could find a wagon returning to Carlisle, and not too heavily laden to take our trunks and allow us occasionally to ride in it. This we at length accom-

plished, and in that way proceeded to Carlisle, and arrived safely, making the whole journey from our homes in about a fortnight."

It is more than a century now since Taney graduated with the degree of Bachelor of Arts in the fall of 1795. During the period of his studentship he went home but twice, by reason of the difficulties of the journey, walking all the way from Carlisle to Baltimore, a distance of eighty-five miles, in a little over two days. He says of his college life that, taken altogether, it was a pleasant one. He boarded with James McCormick, the professor of mathematics, to whose kindness and patience he pays tribute. He speaks, too, of Dr. Nisbet, "whose share of the college duties was ethics, logic, metaphysics and criticism." Also of Dr. Robert Davidson, who lectured on history, natural philosophy and geography, and of Charles Huston, professor of Latin and Greek, the last named becoming a distinguished jurist himself and one of the judges of the Supreme Court of Pennsylvania.

Upon his graduation, young Taney was the valedictorian of his class. He speaks of his effort in a way that indicates that it was a severe trial to him; and that you may have some notion of what a commencement was in those days, I shall quote again from his autobiography, a fragment of which, unfortunately incomplete, may be found in Tyler's Life:

"The commencement was held in a large Presbyterian church, in which Dr. Nisbet and Dr. Davidson preached alternately. A large platform of unplanned plank was erected in this church in front of the pulpit and touching it, and on a level with its floor. From this platform the graduate spoke, without even, I think, a single rail on which he could rest his hand while speaking. In front of him was a crowded audience of ladies and gentlemen; behind him, on the right, sat the professors and trustees in the segment of the circle, and on the left, in like order, sat the graduates who were to speak after him; and in the pulpit, concealed from public view, sat some fellow-student, with the oration in his hand, to prompt the speaker if his memory should fail him. I evidently could not have been very vain of my oration, for I never called on my prompter for it, and have never seen it since it was delivered, nor do I know what became of it. I sat on this platform, while oration after oration was spoken, awaiting my turn, thinking over what I had to say, and trying to muster up courage enough to speak it with composure. But I was sadly frightened,

and trembled in every limb, and my voice was husky and unmanageable. I was sensible of all this—much mortified by it—and my feeling of mortification made matters worse. Fortunately, my speech had been so well committed to memory, that I went through without the aid of the prompter. But the pathos of leave-taking from the professors and my classmates, which had been so carefully worked out in the written oration, was, I doubt not, spoiled by the embarrassment under which it was delivered.”

This recital gives an impression of the highly nervous temperament of the future Chief Justice, and of the strength of will he must have had to have overcome it as he did ; for notwithstanding his long life, for the most part amid the full blaze of public criticism, he was troubled with trepidation in public speaking to the last. In the spring of 1796 Mr. Taney entered the office of Judge Chase, of the General Court of Maryland, at Annapolis, that being the place, he says

“from the character of the judges of the General Court, of the bar who attended it, and the business transacted in it . . . of all others in the state, where a man should study law, if he expected to attain eminence in his profession.”

His student life was one of unremitting labor. Each man must choose for himself that mental regimen which seems best fitted for his advancement, and I, for one, do not advise a student to take the career of any man, no matter how great he may be, and set before him his rules with the determination to adhere to them slavishly, He must consider differences in temperament, time, place and general surroundings, but no one will regret concentration of purpose and steady work to the limit of his capacity ; and the example of men like Taney is well calculated to inspire them. Let me quote again his own views upon what he did, and his advice to one situated as he was :

“I determined not to go into society until I had completed my studies, and I adhered to that determination. In the midst of the highly polished and educated society for which that city was at that time distinguished, I never visited in any family, and respectfully declined the kind and hospitable invitations I received. I associated only with the students, and studied closely. I have for weeks together read law twelve hours in the twenty-four. But I am convinced that this was mistaken diligence, and that I should have

profited more if I had read law four or five hours and spent some more hours in thinking it over and considering the principle it established, and the cases to which it might be applied. And I am satisfied, also, that it would have been much better for me if I had occasionally mixed in the society of ladies and of gentlemen older than the students. My thoughts would often have been more cheerful and my mind refreshed for renewed study, and I should have acquired more ease and self-possession in conversation with men eminent for their talents and position, and learned from them many things which law books do not teach. I suffered much and often from this want of composure and from the consciousness of embarrassment when I emerged from my seclusion and came into the social and business world."

He goes on to say that his reading in the office of a judge was not without its disadvantages, remarking :

"In the office of a lawyer in full practice the attention of the student is daily called to such matters, and he is employed in drawing declarations and pleas, special and general, until the usual forms become familiar to his mind, and he learns, by actual practice in the office, the cases in which they should be respectively used, and what averments are material and what are not. The want of this practical knowledge and experience was a serious inconvenience to me, and, for some time after I commenced practice, I did not venture to draw the most ordinary form of a declaration or plea without a precedent before me ; and if the cause of action required a declaration varying in any degree from the ordinary money counts, or the defence required a special plea, I found it necessary to examine the principles of pleading which applied to it, and endeavored to find a precedent for a case of precisely that character. Nor was it so easy, in that day, for an inexperienced young lawyer to satisfy himself upon a question of special pleading. Chitty had not made his appearance, and you were obliged to look for the rule in Comyn's Digest or Bacon's Abridgment, or Viner's Abridgment, and the cases to which they referred ; and I have sometimes gone back to Lilly's Entries and Doctrina Placitandi in searching for a precedent."

As we all know who are engaged in active practice, and as you have, no doubt, been taught in this law school, the old science of pleading, the study of which made such eminent lawyers, has given place to a system in my judgment far better ; but reforms in the law, and in other things, are apt to have some accompanying disadvantages. The abolition of the study of pleading, except in its superficial outlines, has produced a carelessness and lack of accurate and close think-



ing at the bar that old practitioners look upon with regret. In Taney's young manhood he says :

“Strict and nice technical pleading was the pride of the bar, and I might almost say of the court, and every disputed suit was a trial of skill in pleading between the counsel, and a victory achieved in that mode was much more valued than one obtained on the merits of the case.”

Young Taney attended the sessions of the General Court, under the advice of his preceptor, to watch the trial of causes and the arguments of counsel and try his apprenticed hand at reporting. He says after he came to the bar, when his experience was more mature, that he threw these reports into the fire, being satisfied, when he read them, “that no one was fit for a reporter who was not an accomplished lawyer.” He advises against moot courts, taking the opinion of his preceptor, who thought them an encouragement to young men to argue with insufficient knowledge of the subjects they discussed. He says the danger is that the student will bring the habit with him to the bar, and

“he will sometimes find that it would have been better to have been silent than to have spoken. All the lawyers of Maryland, who have risen to eminence and leadership, were trained in the manner described and advised by Mr. Chase.”

Here, again, I would venture to suggest that the character and temperament of the student should be considered. I cannot but think that moot courts are very excellent aids in stimulating inquiry, and what may, perhaps, be called, for lack of a better term, original research in the law. Competent jurists have complimented the arguments of law students delivered in the ancient Law Academy of Philadelphia, an institution founded for the express purpose of teaching the student and the young lawyer practical methods of conducting business, including arguments before the Supreme Court. There is, undoubtedly, however, a disadvantage to many a young man who, having a facility of speech and of constructing sentences, that when tested by their last analysis convey little or no meaning, has deceived himself and possibly others into the

notion that he was a forensic orator because of his achievements in bodies of this kind.

There were great lawyers in Maryland, as in Pennsylvania, in those early days. Mr. Taney speaks of Luther Martin, Philip Barton Key, John Thompson Mason, John Johnson, Arthur Shaaff, James Winchester and William Pinkney.

Listening to such men in action, and inspired by their success in a profession that requires first of all an absolute devotion to it, and an ambition for success not easily discouraged, after studying closely for three years, in the spring of 1799 he was admitted to the bar. He was still afflicted by nervousness, which, as I have said, never entirely left him. He attributes his misfortune to his delicate health, saying :

“ That it was infirm from my earliest recollection ; my system was put out of order by slight exposure ; and I could not go through the excitement and mental exertion of a court, which lasted two or three weeks, without feeling, at the end of it, that my strength was impaired and I needed repose.”

Acting upon the advice of his father, Mr. Taney settled in Calvert county and became a candidate for the General Assembly of Maryland, and was elected.

During the session of the legislature he was more often in general society, though he complains that a defective vision often made him feel awkward and uncomfortable lest he should be guilty of rudeness in not speaking to someone he knew.

When the session was over, he returned to the country and indulged himself with the reading of general literature and the enjoyments of the beauties of nature.

“ When the weather permitted,” he says, “ I was always out, wandering on the shore of the river or in the woods, much of the time alone, occupied with my own meditations, or sitting often for hours together under the shade, and looking almost listlessly at the prospect before me. There was always a love of the romantic about me, and my thoughts and imaginings when alone were more frequently in that direction than in the real business life.”

On the expiration of his term, Mr. Taney became a candidate again for the House of Delegates, as a Federalist, but was defeated and his prospects for political elevation for the time were ended. He then made up his mind to begin the

practice of the law at Frederick, and, in March, 1801, he took up his abode in that city. Frederick was a place of considerable importance, having mills and manufactories of different descriptions; and, as it was situated on the Cumberland Road, the great highway from Baltimore and the West, it was enlivened by the tide of travel. It required five years of residence before Mr. Taney achieved a practice sufficiently lucrative to make him independent. He had as a fellow student at Annapolis, Francis Scott Key, whose name has been made famous as the author of "The Star-Spangled Banner." On January 7, 1806, Mr. Taney married his friend's sister, Anne Phebe Charlton Key; his marriage was in every way a happy one, Mrs. Taney being congenial in her temperament and accomplished in many ways.

One of Mr. Taney's important cases in his early practice was the trial of General Wilkinson, then Commander-in-chief of the United States Army, before a military court convened at Frederick. This was in the year 1811. Although General Wilkinson was personally unpopular and was prosecuted by the ablest counsel, he was acquitted. Mr. Taney was again a candidate of his party for the House of Representatives about the year 1812, but was again defeated. In 1816, however, he became a member of the State Senate, and achieved a fine reputation in that body.

In those days the feeling against slavery had not extended so far as in later times, but there was a strong feeling of antagonism against it. Naturally, there was much excitement in Maryland, a slave holding community, when the institution was attacked in public speech. A Mr. Gruber, a minister in good standing in the Methodist Church, preaching at a camp-meeting in Washington county to a large audience, of whom four hundred were negroes, in the course of his address is said to have remarked:

"Is it not a reproach to a man to hold articles of liberty and independence in one hand and a bloody whip in the other, while a negro stands and trembles before him with his back cut and bleeding," and he continued with other words equally offensive to the peculiar institution.

Mr. Gruber had come from Pennsylvania, and this fact aggravated his offence; he was indicted by the grand jury as intending to incite the slaves to insurrection, and when the case came for trial Mr. Taney appeared as his counsel. In a powerful address to the jury, he dwelt particularly upon the right of freedom of speech and argued successfully that Mr. Gruber had not gone beyond the limits of his constitutional rights. Mr. Taney's language in regard to slavery is significant in view of his famous utterances in later life :

“A hard necessity, indeed, compels us to endure the evil slavery for a time; it was imposed upon us by another nation while we yet in a state of colonial vassalage. It cannot be easily or suddenly removed, yet, while it continues it is a blot on our national character. Every real lover of freedom confidently hopes that it will effectually, though it must be gradually wiped away and earnestly looks for the means by which this necessary object may be best attained.”

Mr. Gruber was acquitted.

Mr. Taney's reputation had now become great; he was retained in many important causes and his recognition grew as years went by; he was noted for his deference to the bench, and his exceeding courtesy and fairness towards his brother lawyers. Mr. Tyler tells an anecdote to indicate his lofty professional spirit. He was engaged in an ejectment cause, and it stood ready for trial when he noticed that his opponent was unprepared, his locations were wrong, and he would certainly lose his case irrespective of its merits if he went to trial. Thereupon he leaned over to his opponent and told him the fact.

Such chivalrous courtesy should mark every practitioner and he should stamp what is known as sharp practice wherever he meets it. The really great men of the bar have always risen far above sharp practice and petti-fogging methods.

As an orator, Mr. Taney seems to have relied only upon the strength of his arguments and the sincerity with which they were advanced. It is said of him that

“his language was always chaste and classical, and his eloquence undoubtedly was great—sometimes persuasive and gentle, sometimes

impulsive and overwhelming. He spoke, when excited, from the feelings of his heart, and as his heart was right, he spoke with prodigious effect."

In his dealings with the court, it was further remarked by the same authority, Mr. William Schley of the Baltimore Bar :

"that in taking exception to the adverse rulings of the court, he never cloaked a point, but presented it clearly and distinctly for adjudication by the court."

Does this not suggest a thought that should be impressed upon the minds of young men as they come to the bar ; that their admission oath requires them to act "with all due fidelity to the court as well as to the client ?" And does not fidelity to the court require an open, candid statement of the law, and of the facts to the best knowledge of the lawyer ? And should he not feel it his duty to aid the court as far as he can by presenting his conclusions of law with the utmost fairness and without any conscious effort to color his formulas to meet the immediate cause he advocates ?

The retirement of the great Luther Martin and the equally, though differently, great Pinkney, in the year 1823, left an opening at the Baltimore Bar, and Mr. Taney removed to that city.

Although a Federalist in politics, Mr. Taney could not bring himself to support the attitude of that wing of his party which found expression in the Hartford Convention during the War of 1812, and he supported the candidacy of General Jackson for the presidency in 1824. He had no political aspirations, but a man of his eminence could not fail to be a factor in political life under the conditions existing at that time in any state of the Union. He was not so well known beyond the borders of Maryland as his great compeer William Wirt, but in his state, as has been said, he ranged with the most eminent of his profession. In 1827, upon the unanimous recommendation of the Baltimore Bar, he was appointed Attorney-General of Maryland. Causes of the more important kind in all branches of jurisprudence required his professional attention, but he seems to have been especially employed in matters of maritime law, in marine insurance, and

the volumes of reports exhibit his skill, notably as a special pleader.

Hitherto, we have dwelt upon the personal characteristics and professional acquirements of Mr. Taney, as a practicing lawyer, but the turn of events now brought him into history as a statesman. General Jackson became President of the United States in 1829, and owing to internal dissensions some of the members of his cabinet resigned. Mr. Taney's attitude during the War of 1812 subsequently gave him a political position which, together with his professional acquirements, had caused the President to offer him the appointment of Attorney-General of the United States. And upon his indicating his acquiescence, he was appointed to that exalted office in June, 1831. Hitherto, Jackson and Taney had had no personal acquaintance, but there sprang up between them at once a feeling of confidence and regard. At that time the President's attention had been drawn to the conduct of the Bank of the United States, an institution chartered by the general government situated in Philadelphia. This bank found it necessary to apply for a re-charter because by its limitations its original charter would expire in 1836.

In his first message to Congress, in December, 1829, the President drew attention to this fact and indicated a doubt whether the renewal should be granted if applied for by the stockholders. The bank had been created by Alexander Hamilton and had continued in existence, excepting in the interval between 1811 and 1816. It had been approved by Mr. Gallatin as of great public utility during Jefferson's administration, opposed as that great leader was to everything that tended towards centralization. As a result of the financial irregularities during the War of 1812 and the failure of the state banks to produce the proper means of arranging exchanges, the Congress of the United States, upon the report of Secretary Dallas, chartered a new United States Bank in 1816. As the story is told by Charles J. Ingersoll in his *History of the Second War between the United States and Great Britain*, the bank was carried by the Republican party. The Federalists voted against it, especially Daniel Webster,

Jeremiah Mason, and John Sergeant, who became, says Mr. Ingersoll, "its chief counsellors, advocates and agents."

It is evident that Jackson looked upon the United States Bank as the incarnation of what has come to be known as the money power and as inimical to our institutions. Whether this was the growth of experience and observation after he assumed the presidential chair, or as has been asserted, his fixed intention when he assumed the presidency, is only a matter of curious interest. Mr. Ingersoll says that the latter was his feeling, and that from the intimation of his first message, he never swerved, not that he was opposed to a United States Bank in itself, but to the bank as then constituted. Jackson was not alone opposed to the renewal of the National Bank charter, but also to the continuance of the high protective policy and to the internal improvements by the Federal Government, and upon these issues the battle was joined later between Mr. Clay and himself as the candidates of opposing parties for the presidency. "Three years of contest followed between the president of the bank and the President of the United States," after Jackson's declaration in his first annual message, notwithstanding the fact that Congress in both houses supported the bank and expressed disapprobation of its destruction. Two men more unlike than these two presidents, both in early training, education and natural disposition could hardly be found. Jackson, a man of the people, schooled in broader experience, shrewd, unhesitating, and with an iron nerve that upheld him in all his plans, a soldier, moreover, accustomed to direct and simple methods; while the president of the bank, Nicholas Biddle, was equally brave, equally shrewd, but with a temper and education and an environment very different from that of his antagonist.

Mr. Biddle was an eminent citizen of Philadelphia, sprung from a distinguished family and educated in all the accomplishments that distinguish a gentleman, a strikingly handsome person, an orator and a man of force. He was the friend and correspondent of the most distinguished men of his time. Mr. Ingersoll says of him :

"No American had such European repute, and Jackson's was the only one comparable and that far inferior to it."



With antagonists of this character and with an issue so great the battle was fought, and upon his success depended Jackson's re-election and upon his defeat depended the continued existence of the bank.

The defeat of Mr. Clay was overwhelming. Out of two hundred and eighty-eight votes he received but forty-nine, and General Jackson entered upon his second term as President of the United States with his enemy unhorsed and at his mercy.

For a time attention was directed from the bank issues by the Nullification Ordinance of South Carolina, but when, after Jackson's emphatic declaration warning the people of South Carolina of his determined purpose to maintain the authority of the Federal Government, the difficulty was adjusted by the passage of a new Revenue Bill introduced by Mr. Clay, Jackson and his Attorney General appeared to have been of one mind with regard to the continuance of the charter, and neither were men to relax their purpose. They looked upon the continuance of the bank as dangerous to our political institutions and as the exponent of a power not to be trusted. The next move was the removal of the government deposits that had been so long in the bank. First came the message recommending the sale of the seven millions of the stock of the bank, held by the United States; with it a recommendation to investigate whether the public deposits were safe in the bank's custody. In the House of Representatives a committee reported that in the hands of the bank the deposits might safely be continued and this resolution was adopted. Mr. Taney was deeply impressed with the necessity for withdrawing the deposits, and in August, 1833, wrote to the President expressing his opinion. He says in his letter:

“ My mind has for some time been made up that the continued existence of that powerful and corrupting monopoly will be fatal to the liberties of the people, and that no man but yourself is strong enough to meet and destroy it; and that if your administration closes without having established and carried into operation some other plan for the collection and distribution of the revenue, the bank will be too strong to be resisted by any one who may succeed you. Entertaining these opinions, I am prepared to hazard



much in order to save the people of this country from the shackles which a combined moneyed aristocracy is seeking to fasten upon them."

Jackson answered :

"The United States Bank attempts to overawe us. It threatens us with the Senate and with Congress, if we remove the deposits. As to the Senate, threats of their power cannot control my course or defeat my operations."

And he continued at length, indicating, that if Mr. Duane, the Secretary of the Treasury, should decline to carry out his policy, he would transfer Mr. Taney from the Attorney Generalship in order that he might do so. It turned out as anticipated; the Secretary of the Treasury refused to withdraw the deposits and was removed by the President, Mr. Taney being appointed Secretary in his stead. He entered upon his duties in the Treasury Department on the 24th of September, 1833, and on the 26th gave the order for the removal of the deposits, at the same time notifying the various banks that they had been selected as depositories for the public money instead of the United States Bank. The consequences were immediate, and most painful; the loans and discounts of the banks amounting to more than seventy millions were immediately called in, the bank alleging that the loss of the deposits compelled it to this action. The state banks were compelled to the same course, and the paper currency being thus suddenly contracted, a vast train of financial difficulties resulted. A panic came upon the country unprecedented in its history.

"Commerce became embarrassed. Property became unsalable. The price of produce and labor was reduced to the lowest point. Thousands and tens of thousands of laborers were thrown out of employment; and many wealthy people were reduced to poverty. The friends of the bank were involved in common ruin with its enemies."

When Congress met in December, 1833, the President boldly accused the bank of a misuse of its powers, especially asserting that

"in violation of the express provisions of its charter, it had by a formal resolution, placed its funds at the disposition of its president, to be employed in sustaining the political power of the bank."

He then explains the appointment of the new Secretary and ascribes to the efforts of the bank "to control public opinion through the distresses of some and the fears of others," the panic that existed. Mr. Taney addressed a letter to the Speaker of the House of Representatives explaining his action. There was no doubt of his legal right to remove the public moneys, and the question to be answered related only to its expediency. The Secretary did not hesitate to place his opposition to the renewal of the bank's charter upon the ground of its great power, it being, said he,

"a fixed principle of our political institutions to guard against the unnecessary accumulation of power over persons and property in any hands. And no hands are less worthy to be trusted than those of a moneyed corporation."

Although the Senate stood by the bank in this last struggle, the House of Representatives supported the administration, and the renewal of the charter was refused. The policy of General Jackson, which as we have seen, was urged upon him by Mr. Taney, aroused opposition, respectable not alone from its numbers, but from the character of its representatives. Such names as Clay, Webster, Calhoun, McDuffie, Binney, Adams were strenuous in their opposition.

Taney's biographer sees nothing to criticise adversely in the conduct of the administration, and explains the evils resulting from the conflict with no little force, remarking:

"When a government has instituted a policy even of ultimate ruin, interests spring up under that policy, upon which thousands of fortunes depend, that must suffer in the transition to even a policy which only can save the country from destruction. Of all powers on earth, the money power is the most mighty, the most unscrupulous, the most craving, the most unrelenting, and the most sure to have devotees. It has not only bought individuals, but governments, and, in fact, the ruling majority of nations. And there is nothing so fatal to all that is great in man as the dominion of money. There is no more important civil achievement in the working of our Government than the overthrow of the bank of the United States." (Tyler, page 217.)

Having accomplished this prodigious work, Mr. Taney met the brunt of the opposition and was refused confirmation as Secretary of the Treasury, when near the close of the session

in June, 1834, his name was sent to the Senate. Thereupon he resigned, taking with him the approval of his own conscience, the earnest thanks of the president, and the denunciation of those who were opposed to his policy.

There can be little doubt now—that more than sixty years have rolled by since the fierce and embittered contest to which we have made reference—that Jackson and Taney were right in their opposition to the concentration of power in the great corporation which they slew; but, whether they were right or wrong, no one can fail to admire the strength and courage they showed. But at that time, in the face of distress and suffering resulting from the battle, there was a large body who looked upon Jackson as being little less than a madman, and Taney, to use Webster's expression, as his "pliant instrument." Taney's motives are thus set forth by himself:

"It was obvious to my mind, from the facts before me, that a great moneyed corporation, possessing a fearful power for good or for evil, had entered into the field of political warfare, and was deliberately preparing its plans to obtain, by means of its money, an irresistible political influence in the affairs of the nation, so as to enable it to control the measures of the government. It was evident, if this ambitious corporation should succeed in its designs, that the liberties of the country would soon be destroyed; that the power of self-government would be wrested from the people, and they would find themselves, at no distant day, under the dominion of the worst of all possible governments—a moneyed aristocracy. In this posture of affairs, full of peril and of the deepest interest to this great nation, I saw the gray-haired patriot now at the head of the government, who has so often breasted every danger in defence of the liberties of his country, once more prepared to plant himself in the breach, to defend his countrymen, at every hazard to himself, from the impending danger. I firmly believe and still believe, that the safety of the country depended on his prompt and decisive action. I had long, as one of his cabinet, advised the proceeding which he finally made up his mind to adopt. . . . It was impossible, in a crisis when the dearest interests of the country were at stake, that I would, without just disgrace, have refused to render my best services in its defence. I should have been unworthy of the friendship of the high-spirited and patriotic citizens who are now around me if I could have thought of myself and my own poor interests at such a moment."

With his rejection by the Senate in 1834 Mr. Taney retired for a brief while from public life, but in 1835 the resignation

of Mr. Justice Gabriel Duvall made a vacancy among the Associate Justices of the Supreme Court of the United States, and Mr. Taney's name was again sent to the Senate for this great office. It was an interesting fact that it was before Judge Duvall that Taney had argued his first case in the Mayor's Court of Annapolis, and now he found himself named as his successor. The Senate did not reject, but indefinitely postponed the nomination, so that it fell.

Chief Justice Marshall, after presiding over the court for thirty-four years—he having taken his seat on the bench at the February Term, 1801—died in the summer of 1835, and on the 28th of December of that year Mr. Taney was nominated to fill his place. Notwithstanding the opposition, led by Clay and Webster, his nomination was confirmed. It is interesting to know that Marshall himself had expressed a desire for his confirmation when named for the Duvall vacancy, thus giving evidence of his own appreciation of his successor's learning and character.

Of his career as Chief Justice, speaking of him strictly from a professional point of view, one cannot enlarge within the limits of an address. His opinions, says George W. Biddle,

“contained in thirty-two volumes of reports, beginning with 11 Peters and ending with 2 Black, are distinguished by their clearness, learning, directness and firm grasp of the points discussed, and, when dealing with constitutional subjects, for sound and weighty reasoning, thorough acquaintance with the political history of the country, and for the close bearing of all contained in them upon the question under examination.” (Political Science Lectures, Univ. of Michigan, 1889, p. 125).

Questions covering the whole range of jurisprudence were presented for consideration and argued at the bar of the court by men unexcelled in learning and ability—questions of far-reaching constitutional importance. Chief Justice Marshall had set up the landmarks upon the field of constitutional law which have rarely been moved by later decisions. So his successor, though differing at times in his point of view, continued the work of development and set stricter limits where necessary.

We shall glance at a few of his decisions. In the famous case of *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, the case had been argued before Chief Justice Marshall, but not then decided. The provision of the Federal Constitution prohibiting states from passing any law impairing the obligation of the contracts was interpreted. It was contended that an exclusive privilege had been granted to the Charles River Bridge, and, therefore, the Warren Bridge could not be erected, as the act of the Legislature of Massachusetts, authorizing the erection of the Warren Bridge, impaired the implied contract contained in the charter of the Charles River Bridge. But the Chief Justice held that public grants must be construed strictly, and that we cannot,

“by legal and mere technical reasoning, take away from them any portion of that power over their own internal policy and improvement which is necessary to their well-being and prosperity.”

Mr. Justice Story, one of the most eminent men who have ever graced the American bench, and whose text-books have been for years manuals for students of law, dissented from the Chief Justice, and viewed with melancholy the tendency of the court. He was fearful lest the principle of the Dartmouth College case should be obliterated. But, says Mr. Biddle :

“Unless the luxuriant growth, the result of the decision in 4 Wheaton, had been lopped and cut away by the somewhat trenchant reasoning of the Chief Justice, the whole field of legislation would have been choked and rendered useless in time to come, for the production of any laws that would have met the needs of the increasing and highly developed energies of a steadily advancing community.”

Another case in which Justices Story and McKinley dissented from a majority of the court was that of *Groves v. Slaughter*, where it was decided that the constitution of Mississippi was not self-enforcing, but required an act of the legislature to carry into effect its provision against the introduction of slaves into that state as merchandise for sale. Chief Justice Taney concurred with the majority of the court and gave this significant judgment, that it was for the states to decide for themselves alone whether or not they would allow

slaves to be brought within their limits from another state, either for sale or for any other purpose, and adding the thought that Congress could not control their action by any constitutional power. (15 Peters, 449.)

Another great case in which the opinion of the court, delivered by the Chief Justice, involving the ownership of certain land covered by the waters of the Bay of Amboy, in the State of New Jersey, decided that the title of the soil under navigable rivers remained in the ownership of the state as part of

“the prerogative rights annexed to the political powers conferred upon the original proprietary grantee of the crown, to which the state had succeeded, and did not pass as private property.”

One of the great slave cases, if they may be so called, is that of *Prigg v. The Commonwealth of Pennsylvania*, 16 P. 539, wherein it was decided that the Act of Assembly of Pennsylvania of March 25, 1826, under which the plaintiff in error was convicted of kidnapping, was unconstitutional. In this case the Chief Justice dissented from the opinion of the court delivered by Justice Story, that the Congress alone had power to legislate on the subject of fugitive slaves. The facts of this case were these: Prigg, a citizen of Maryland, had kidnapped a fugitive slave in Pennsylvania and had restored her to her owner in Maryland. He was indicted for this in Pennsylvania, under a law which declared that the taking of any negro or mulatto by force from the state was a felony. The act provided a means whereby fugitive slaves could be returned legally, requiring a hearing before a magistrate, and this act had been violated by Prigg. When the case came before the court on the part of Prigg the Pennsylvania act was held unconstitutional, because the Constitution had provided that the remedy should be exclusive in Congress, and the states were prohibited from passing any law upon the subject. Chief Justice Taney, although concurring with the majority of the court, did not agree in this view of the powers of the states, holding that, so long as they did nothing to impair the law as enacted by Congress, there being no express condition, they could make any regulations they chose on the

subject. This was a case in which, while the entire court concurred in the conclusion that the act was unconstitutional, they differed widely in the reasons that lead them to this conclusion. The decision reached in this case led Congress to attempt later to meet some of the objections raised by the court by the famous Fugitive Slave law, passed in 1850; but the question can never be said to have been finally settled to the satisfaction of the people until the Civil War solved it for all time.

One of the greatest cases, in its far-reaching effects upon the commerce of the country, decided by the court in 1847, in which the opinion was delivered by Mr. Justice Wayne and concurred in by the Chief Justice, was that of *Waring v. Clarke*, 5 Howard, 441, which extended the maritime jurisdiction of the United States Court to the navigable rivers and the great inland waters, irrespective of the old English test of the ebb and flow of the tides. It may seem strange at this time that it should have been contended that rules governing the jurisdiction of admiralty courts upon the comparatively insignificant waters of the Island of Great Britain could be invoked to fetter the commerce of the Great Lakes or the Mississippi River. And yet there were strong dissents to the view taken by the majority of the court in this case. The decision in *Waring v. Clarke* was subsequently sustained and reaffirmed by the Chief Justice in the case of the *Genesee Chief*, where it was held by the Chief Justice that an act of Congress extending maritime jurisdiction was entirely constitutional.

It would be an unnecessary labor to attempt a critical review of Chief Justice Taney's great decisions during the first half of his term. So many subjects were embraced, so perspicuous were his judgments that each is worthy of separate consideration. The student must read them in the original reports for a thorough knowledge, and for one merely historical, he will find in Mr. Biddle's paper, already alluded to, and in Mr. Carson's History of the Supreme Court, a commentary that will repay his reading. Mr. Carson is not carried away by admiration for the successor of Judge Marshall, to



whom his unbounded admiration is paid, and it was no lightly expressed conviction which inspired this passage in his History.

“On the whole the work accomplished by Taney and his associates during the first fourteen years of his term, was quite as essential to the full realization of our welfare as a nation and an accurate appreciation of the true character of our government as any preceding epoch in the history of the court. It served to check excesses, to limit extravagancies of doctrines, to awaken and develop new powers, to moderate tendencies, to introduce contrasts and elements which in future years could be mingled and used for the preservation of the whole, as well as for the protection of each part.” (Carson, History of the Supreme Court, 336.)

Twenty years had passed since Judge Taney had taken his seat on the bench, when, in 1856, the case of *Dred Scott v. Sanford*, 19 Howard, 393, was decided.

After the lapse of forty-two years it should be possible to approach the consideration of this famous decision with calmness and impartiality, but at the time of the decision there existed too tense a feeling between the pro-slavery and anti-slavery elements to permit an impartial judgment, and the consequence was a storm of abuse directed against the venerable Chief Justice, from which his whole career, lofty, brave and pure as it had been, should have defended him. This was an appeal by Dred Scott, a negro, from the decision of the Circuit Court of the United States for the District of Missouri. Scott had brought an action in the United States Court to establish the freedom of himself, his wife, and two children, claiming to be a citizen of the State of Missouri, thus showing the court's jurisdiction against the defendant, the administrator of his reputed master, who was a citizen of the State of New York. The defendant filed a plea to the jurisdiction of the court alleging that the plaintiff being a negro of African descent, whose ancestors had been brought to this country as slaves, was not a citizen of Missouri.

A general demurrer was filed to this plea, and sustained by the court, and the defendant required to answer over. The defendant then pleaded in bar, of the action that the plaintiff, his wife and children were slaves, and the property of the defendant.



At the trial the facts were agreed upon that, in 1834, Dred Scott was a negro slave, and belonged to Dr. Emerson, a surgeon in the Army of the United States, who took him to a military post at Rock Island, Illinois, and held him there till 1836 as a slave. Dr. Emerson then removed the plaintiff to Fort Snelling, north of 36° 30' and north of the State of Missouri, where he held him as a slave till 1836.

In 1835, Harriet, a negro slave of Major Taliaferro, an officer in the army, was taken by her master to Fort Snelling, where she was held as a slave until 1838, having been sold in the meantime to Dr. Emerson.

In 1836, the plaintiff and Harriet, with the consent of Dr. Emerson, inter-married at Fort Snelling, and had two children, one born north of the north line of Missouri, and another within that state.

In 1838, Dr. Emerson removed the plaintiff and his wife and children to the State of Missouri where they have since resided. Before the commencement of the suit, Dr. Emerson sold the family to the defendant as slaves, and the defendant had ever since claimed them as such.

Previous to this action, Dred Scott brought suit for his freedom in the Circuit Court of St. Louis Co., and obtained a verdict and judgment in his favor, but on writ of error to the Supreme Court of the state, the judgment below was reversed, and the case remanded to the Circuit Court of the state to await the decision of this case. At the trial, the jury, under instructions from the court, found a verdict that the plaintiff, his wife and children were negro slaves, the lawful property of the defendant. Upon this verdict, judgment was entered for the defendant, and the plaintiff filed exceptions to the instructions of the court. Upon these exceptions the case came up on writ of error to the Supreme Court of the United States.

When the record reached the court, it presented two questions: 1. Whether Scott by reason of his African descent, irrespective of the question of his personal freedom, could be a citizen "of the States of the Union."

2. Whether the fact that Scott having been a slave in the state of Missouri, after being taken by his master to a free

state, and thence into that part of the Louisiana purchase, north of the parallel of  $36^{\circ} 30'$ , "where slavery was prohibited under the Act of Congress known as the Missouri Compromise Act, and then being brought back to the State of Missouri, was, in legal effect, emancipated by residence with his master in a free state or a free territory, so that the condition of servitude would not re-attach to him on his return into Missouri."

The first question was involved in the decision of the court in the plea to the jurisdiction. If the court below was wrong in sustaining the demurrer to this plea, and its action should be reversed, it would not be necessary to enter into any consideration of the merits of the case. The only necessary order would have been a mandate to the court below to dismiss the case for lack of jurisdiction. If, however, the court should hold with the court below that it was compatible with citizenship to be a negro of pure African descent, then the second question would have to be decided, whether residence such as had been held by Scott and his family in a free state, and in the Louisiana Territory, north  $36^{\circ} 30'$  would entitle him to freedom.

The second question involved (a.) a consideration of the effect of the residence in a foreign state upon the status of a slave in Missouri, and, (b.) the right of Congress to prohibit slavery in any portion of the Territory of the United States as well as the effect of such prohibition upon the status of the slave in Missouri.

The case was first argued at the December Term of the Supreme Court in 1835, and it was then decided, in conference, that it would not be necessary to decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of its merits, *i. e.*, by deciding whether he was a freeman or slave upon the facts agreed upon by the parties under the plea in bar of the action.

The question to be decided in this view of the case was merely whether the removal of Scott, by the temporary residence of his master out of the State of Missouri, affected his status in that state. This question was already *res adjudicata* in Missouri, the Supreme Court having decided to the effect

that Scott's removal had not emancipated him,—a decision at variance with other decisions of the State Supreme Court, but the last one on the point.

Mr. Justice Nelson was assigned to write an opinion embodying this view of the case, which he did, JJ. Curtis and McLean dissenting. In commenting upon this opinion, George Ticknor Curtis says :

“ The astuteness with which this opinion avoided a decision of the question arising out of the residence of Scott in a Territory of the United States, where slavery was prohibited by an Act of Congress, and the remarkable subtilty of the reasoning that this, too, was a matter for the state court to decide, because the law of the territory could have no extra territorial force except such as the State of Missouri might extend to it under the comity of nations, show very distinctly that, after the first argument of the case in the Supreme Court, it was not deemed by a majority of the bench to be either necessary or prudent to express any opinion upon the constitutional power of Congress to prohibit slavery in the Territories of the United States. It was said, in the opinion prepared by Judge Nelson, that even conceding for the purposes of the argument, that this provision of the Act of Congress is valid within the territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a state. . . . Our conclusion, therefore, is upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal Court, sitting in the state and trying the case before us, was bound to follow it.”

Mr. Curtis remarks very justly :

“ If this view of the case had been adhered to by a majority of the court, no judge would have placed himself on record as holding that a free negro could not be a citizen, and therefore could not obtain a standing in the Circuit Court, and at the same time holding, under a subsequent plea to the merits, that he had no claim to freedom, because the Congress of the United States had no power to prohibit slavery in the National domain.”

Shortly after the opinion of Justice Nelson had been written, and, of course, before it was promulgated, Justice Wayne proposed a re-argument of the case, and it was ordered for the ensuing term upon the two questions :

1. Whether, after plaintiff had demurred and the court had given judgment on the demurrer in favor of plaintiff and had ordered the defendant to answer over, and the defendant had

pleaded to the merits, the Appellate Court can take notice of the facts admitted in the record by the demurrer, so as to decide whether the court had jurisdiction to hear and determine the cause.

2. Whether or not, assuming the court is bound to take notice of the facts appearing upon the record, the plaintiff is a citizen of the State of Missouri within the meaning of the Judiciary Act of 1789.

“It will be seen that these questions,” says Curtis, “in substance and in terms related to the facts set up in the plea to the jurisdiction, and to the power of the Appellate Court to act upon those facts after that plea had been overruled by the Circuit Court and the defendant had been ordered to plead to the merits, and on those facts set forth in the plea to the jurisdiction to determine the citizenship of the plaintiff. If the facts of Scott’s African descent and the slavery of his ancestors set up in the plea to the jurisdiction could be rightly taken notice of in the Appellate Court, as admitted by the plaintiff’s demurrer to that plea, and if it should be held that these facts amounted in law to proof that he was not a “citizen,” then there was nothing that could in judicial propriety be done but to order the case to be dismissed for want of jurisdiction. But if it should be held that on these facts, assuming that the Appellate Court was bound to notice them, Scott was a citizen, within the meaning of the Judiciary Act, then, and only then, it would be necessary for the judge to act upon the merits of the case, and as a part of the merits to determine the constitutional validity of the Missouri Compromise restriction.”

Unfortunately for the fame of the Chief Justice and of the court, one of its justices, Wayne, conceived the idea that the opportunity had come for the court to decide the question of the extension of slavery in the territories by deciding that Congress had no right to prohibit its introduction, and that the Missouri Compromise Act was null as beyond the power of Congress to enact. Chief Justice Taney and Justices Catron and Grier concurred in the views of Justice Wayne, and accordingly the Chief Justice wrote an opinion which, when promulgated, set the country in a flame. As analyzed by Mr. Biddle his opinion asserts the following propositions:

“1. A free negro of the African race whose ancestors were brought to this country and sold as slaves, is not a citizen within the meaning of the Constitution.

“2. The judgment of the Circuit Court was, therefore, erro-

neous, as it had no jurisdiction of the controversy between the parties.

“3. Scott was a slave. The law making the Territory of Wisconsin free territory is unconstitutional and void.

“4. The Missouri Compromise Act of March, 1820, is unconstitutional and void.”

No one, with any knowledge of character, would question at this time the absolute integrity of motive on the part of the Chief Justice in rendering this decision, but fairness requires that we should pronounce it an error of enormous consequence—all the worse because committed by going outside the legitimate field of judicial decision. As Mr. Carson says:

“Without entering into technical niceties, it is perhaps sufficient to say that the general judgment of the profession, irrespective of the political question involved, is to the effect that the court after holding upon consideration of the plea in abatement that Dred Scott was not a citizen of the United States ought to have dismissed the case, without entering upon the consideration of the second question involved, and that in doing so they transcended the proper bounds of judicial authority and indulged in mere *obiter dicta* of no legal validity or conclusiveness.”

And Mr. Biddle expresses the view

“that the Chief Justice in an anxious endeavor to carry out the views so often expressed by him as to the right of the individual states to deal exclusively with the subject of this domestic relation has been carried beyond the proper limitations within which it should have been confined.” He bases his views upon this reasoning:

A. The plea in abatement simply raised the question whether a free person of African descent, whose ancestors were slaves, was a citizen entitled to sue. . . . Now it was shown by Curtis, J., his opinion that in several states, notably North Carolina, at the time of the adoption of the Constitution free negroes were citizens. Therefore the plea was bad.

B. The legislation by Congress, including the celebrated Act of 6th March, 1820, was justified by the Constitution. The article in question which the Chief Justice said applied only to the territory ceded by Virginia and some other states (Northwest Territory) had no such restricted meaning. This is clear.

1. By the history of the times. 2. By the inherent force of the words of the Article (Article IV, Section 3, paragraph 2). 3. By all fair and reasonable rules of construction, including contemporaneous construction.

C. Lastly the courts of Missouri had no right to disregard the law, and to reverse their original decisions, nor was the Federal

Supreme Court bound to follow the last decision of the highest court of this state under the circumstances presented."

While it is true that six of the eight Associate Justices of the Supreme Court concurred with the Chief Justice in holding that Dred Scott was a slave and that the judgment of the Circuit Court should be affirmed, each of these judges filed a separate opinion, and their views upon the various questions involved were for the most part very divergent. The great opinion on the Dred Scott case is not that of the Chief Justice, but that of Mr. Justice B. R. Curtis, of which Mr. Biddle says, "hardly too much can be said in praise of this masterly effort."

Justice Curtis having affirmed the ruling of the court below in favor of its jurisdiction, in sustaining the demurrer to the plea filed, which alleged that his African ancestry debarred Scott from citizenship, proceeded to show that while the question of the power of Congress was not legitimately before the court, under the view of the majority, yet as the court had jurisdiction in his view, he proceeded to consider the case on its merits. He shows by a powerful reasoning that the court below was wrong in its decision and that it should be reversed.

At this distance of time, with a new generation grappling with new issues, it requires an effort of the imagination to appreciate the enormous sensation caused by the Dred Scott decision. One of the counsel, a brother of Judge Curtis, in his memoir of his distinguished brother, gives his opinion as follows :

"The course of the majority of the judges in this case of Dred Scott precipitated the action of causes which produced our Civil War, and which would otherwise have lain dormant until the period of danger to the Union, arising out of the existence of slavery, had passed by . . . On the one hand, without the stimulus afforded by the 'decision,' there would have been no adequate cause for the formation in the Northern States of a geographical party with professed efforts aimed at the supposed predominance of the 'slave power' in the councils of the nation. On the other hand, without the new and unnecessary stimulus of this supposed 'decision,' Southern feeling in regard to the importance of a theoretical right to carry slaves into the territories must have died a natural death. . . . Thus a great misfortune, for which the people should not be blamed, because it was not

solely by the arts of demagogues or politicians that their confidence in the court was impaired. That confidence was impaired in the minds of men whom no arts of the demagogue or politician could reach. A vast majority of the legal profession throughout the whole North, and some of the best legal minds in the South, alike rejected the supposed decision and were alike dissatisfied." (Curtis, *Life of B. R. Curtis*, 197, 198).

Under such provocation attacks were made upon the Chief Justice of a character too outrageous to dignify by attempting a defence. The meanest, because of the artful way in which his language was presented, was that which attributed to him the sentiments that a negro "had no rights which the white man was bound to respect," when the context shows that he was endeavoring to state an historical fact to show the estimation in which the unfortunate race was held at the time of the adoption of the Constitution.

How grossly unjust it was to attribute unhumane sentiments to this venerable man, especially in his relations with the negro. Although born a slaveholder, he was so inimical to the system that he manumitted all of his slaves and took the warmest interest in their welfare. His professional abilities were freely given in the defence of their cause. He was even known to stop a child and help her with her bucket of water in the streets of Washington when he was in high position—and she but a slave, the child of a despised race.

Let us turn from this, the one great, most unfortunate episode in a career distinguished for usefulness and lustrous with examples, to be held up to the admiration of future generations. Let it be finally admitted, in the light of history, that, with intentions too pure and lofty to be doubted, six Justices of the Supreme Court committed an error, and with their chief must bear the responsibility to a greater or less extent. The majority went aside from the true path and fell into a pit. Their conclusions were riddled by the inexorable logic of Curtis and McLean, and served no other purpose than to make a solemn warning to their successors.

When the war broke out, the Chief Justice, now venerable with a great age, proceeded, amidst the heated excitement of the times and even in the clash of arms, to administer the



laws with a calmness and unchangeable dignity that extorted admiration even from his enemies. His stern determination to maintain the supremacy of the National Government in matters within its domain was exemplified in the case of *Ableman v. Booth*, 21 Howard, 506, where the Supreme Court of Wisconsin had decided that the Fugitive Slave law was unconstitutional and resisted its enforcement. In his opinion the Chief Justice observes :

“ Now it certainly can be no humiliation to a citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it ; nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith ; and certainly no faith could be more deliberately and solemnly pledged than that which every state plighted to the other states to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes.”

Such was the attitude of this great jurist on the question of the sovereignty of the National Government ; but when the officers of that government exceeded their authority, not all the terror of military force could swerve him from rebuking the action.

In *Ex parte Merryman*, (Campbell's Reports, 246), a citizen of Baltimore was arrested in May, 1861, by a military force under order of Major-General Cadwalader, of the United States Army, and imprisoned in Fort McHenry. Upon petition of the prisoner a writ of *habeas corpus* was issued by Chief Justice Taney, sitting at chambers, directing the commandant of the fort to produce the body of the prisoner the next day. When the writ had been served, the officer made return declining to obey it, (1) because the petitioner had been arrested, by order of the Major-General commanding, on a charge of treason in being “ publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government ; (2) that the officer having the peti-



tioner in custody was duly authorized by the President of the United States in such cases to suspend the writ of *habeas corpus* for the public safety."

The Chief Justice held these reasons to be insufficient, and that the petitioner was entitled to be set at liberty. He issued an attachment for contempt against General Cadwalader; but when the marshal's returns showed that he could not serve the writ, and the evidently superior military force made it useless to summon the *posse comitatus*, he held the marshal excused and filed an opinion upon the facts and law of the case, showing that the writ could not be suspended without authority of Congress. As remarked by Mr. Tyler, in his biography:

"There is nothing more sublime in the acts of great magistrates that give dignity to governments than this attempt of Chief Justice Taney to uphold the supremacy of the Constitution and the civil authority in the midst of arms. His court was open, and he sat upon the bench to administer the law. The cannon of Fort McHenry, where Merryman was imprisoned, pointed upon the city of Baltimore. But the Chief Justice, with the weight of eighty-four years upon him, as he left the house of his son-in-law, Mr. Campbell, remarked that it was likely he should be imprisoned in Fort McHenry before night, but that he was going to court to do his duty." (Tyler, 427.)

When we sit down in the quiet of our libraries to give a calm judgment upon the action of the Supreme Court in the case of Dred Scott, we shall see how, even the greatest, purest and most dispassionate men all unconscious to themselves, are influenced by their environment. The curse of slavery lay upon this country like a deadly blight, and it penetrated all classes of society in the South and warped the judgment of men whose interests were involved in the North. It is no reflection upon the great Chief Justice, nor upon any of his associates, to say that they were affected by the condition of the civilization then existing. They were men of conservative temperament and they well hoped that the fiat of the law would end the controversy. They were greatly mistaken. As Mr. Biddle says, in his criticism of the decision in the case of *Prigg v. The Commonwealth of Pennsylvania*:

“In truth the subject lay beyond the domain of legislative or judicial action. The feeling is so deep-seated in the hearts of men to comment upon unfavorably, and to prevent, if possible, the exercise of all authority distasteful to their passions or their prejudices, that it is impossible to reason with it, or even to contend against it, except by the exercise of physical force.

Especially is this so in free countries, and particularly in one where the general level of intelligence is high, and the means for concerted action abundant by reason of the ability for the almost instantaneous propagation of the thoughts and opinions of the general mass. In vain shall you attempt to appeal to the reason or patriotism of men thus aroused. You may demonstrate with unerring truth that the Constitution is incapable of more than one construction upon the point in question, and you may show with the clearness of the noonday sun that this construction favors the obnoxious practice. You may further prove from the history of the times, with an accuracy which admits of no challenge, that the compact by which the several states were fused into one united body would never have taken place without the concession which is found enacted into words in the instrument of union. You may talk of duty, justice, fairness, submission to the laws; but you talk against the wind in doing so. When men's passions are aroused they no longer reason. Passion is at one end of the line, reason at the other, and the latter is always outweighed by the former. Men simply rely upon their feelings as their principle of action; and especially do they do this when they can indulge in the luxury of gratifying these feelings without expense to their pockets. Adam Smith wrote, nearly a hundred years ago, that the resolution by which our ancestors in Pennsylvania set at liberty their negro slaves, must satisfy us that their number then could not have been very great in that state, and before making this statement he had demonstrated ‘that the work done by slaves, though it appears to cost only their maintenance, is in the end the dearest of any kind of labor.’ ”

It is not my purpose, nor do I think it to be within the scope of a paper of this kind, to attempt to describe the private life of Chief Justice Taney, but it is necessary for a just appreciation of his character to know something of his habits of life. With the sincerity that was one of his most notable attributes, he carried out unostentatiously, but with perfect consistency, his conception of his duties towards Almighty God; never swerving from his faith in the Holy Roman Catholic Church. He obeyed its requirements down to the smallest detail. I have been told by one who often saw him in his declining years, that it was his custom to attend Mass

daily and his slight spare form was a familiar figure on the streets of Washington in the early hours of the morning on his way to and from his church. He was scrupulously exact in the performance of official duty, yet he was loved and revered by all his associates. It was said of him by a political opponent (Mr. Lamon),

“Chief Justice Taney was the greatest and best man I ever knew. I never went into his presence on business, that his gracious courtesy and kind consideration did not make me feel that I was a better man for being in his presence.”

When in his eighty-eighth year, but a short time before his death, one of the members of his family asked him for a sentiment with his autograph, he chose the well-worn, but always impressive lines of Horace :

“*Justum et tenacem propositi virum  
Non civium ardor prava jubentium,  
Non vultus instantis tyranni,  
Mente quatit solida.*”

And surely they were descriptive of his own character ; just and tenacious of his views, he could not be shaken by any threat from their defence when occasion required.

On the 12th of October, 1864, his illustrious career closed. I think from what has been said, you will need no words of eulogy to impress upon your minds the examples it has shown for the emulation not only of lawyers, but of all good men. It was said of him by a venerable jurist, Charles O'Connor, “I will not attempt the hopeless task of intensifying by mere words the strong emotions of affectionate and reverential regret for our great loss universally felt. Those who knew Chief Justice Taney, who witnessed in his administration of justice the gracious dignity of his bearing, and the stern impartiality of his judgment find in their own vivid recollections a voice with which mine cannot compete. Those who have not enjoyed that high privilege will gather from the perusal of his recorded decisions far better conceptions of his worth and intellectual greatness, than any mere eulogium could inspire.”

*Walter George Smith.*

Philadelphia.

## ANOMALOUS INDORSEMENT IN PENNSYLVANIA.

When one, not a payee or maker, indorses a note for the purpose of giving the maker of it credit with the payee, and before the note has been indorsed by the payee, he is called an anomalous indorser. It is the impression, in Pennsylvania, that there is no way in which to hold such an indorser. A wishes to borrow \$1000 and B offers to lend it if A will give security. Accordingly a note is made—payable to B, signed by A as maker, and indorsed by C to give it credit with B, who then parts with his \$1000 to A. The attitude of the Pennsylvania courts, it is thought, is : that B cannot hold C ; that a subsequent holder who has notice of the circumstances of the indorsement cannot hold C ; and that it is sufficient notice of these circumstances if B's name appears on the back below C's. A doctrine of this sort is admitted to be not altogether satisfactory ; for, in the first place, it is opposed to the law of, perhaps, every jurisdiction in which negotiable instruments are in use ; and because, secondly, it is a result which our sense of natural justice instinctively condemns ; but still it is reinforced by a respectable opinion that on principle it is correct and that any contrary doctrine is not. Under such circumstances two questions are naturally suggested. Is it really inconsistent with the legal theory of notes to hold an anomalous indorser ? And if not, have the cases, nevertheless, settled the question beyond hope of being corrected ?

The first question has been so much discussed that one need not attempt to add anything to what has already been said upon it. My purpose in going into it is to get together some material that will be of help in answering the second, that is, in clarifying the cases, and so to find out exactly on what terms Pennsylvania really is with the subject.

Putting the intimation already thrown out into the shape of a proposition, we may start out by saying that it is *not* inconsistent with legal theory to attach a liability to an anomalous indorser ; and since, to prove this, it is obviously necessary to

show only *how* he can be held, lack of patience drives us at once to the consideration of this narrower question. Now, however much we may be bent upon holding him to some liability, we will quickly make up our minds not to hold him to a liability that does not fit his intention. It is unfair, for instance, to hold him as a maker or guarantor, for he did not intend to assume the liability of either of these. He intended to be liable only after the maker; and, although he understood himself to be liable secondarily, it was not necessarily as a guarantor. He expected, furthermore, to be liable only upon demand and notice; to make him a maker or guarantor dispenses with these. Pennsylvania, in the early cases, did not notice these objections and the disposition to hold him as a guarantor was almost crystallized into a settled doctrine. Of course, there was no injustice in those cases in which there was notice; and one is not disposed to object seriously to a case which it is better to know is settled than how. But the mistake led to holding the indorser even where there was no notice and so imposed a different liability from what was assumed. Both these errors were soon unconsciously corrected by the Statute of 1885, which not only required guaranties to be in writing, but did not have that requirement satisfied by simple indorsement. Corrected? Yes, but not entirely; an opportunity was open to start on the right track. Instead, the courts made another and more serious mistake; they assumed that if the anomalous indorser could not be held as guarantor, he could not be held at all—this without really any attempt whatever at hunting for another liability.

Why not hold him as an indorser? That certainly is the very liability he intended to assume, and, besides, demand and notice are necessary to hold him as such; so that the objections that keep him from being responsible as a maker or guarantor are got rid of. It has, therefore, been suggested that he should be held as a first indorser, because "the prior party's position on the note seems to render his liability strictly analagous to that of the drawer of a bill upon the maker in favor of the payee."<sup>1</sup> There is something clumsy in

<sup>1</sup> Daniel, Sect. 714.

this suggestion and, besides, no one but a payee can be first indorser.

A better and more scientific theory, it seems, has been adopted by the New York court. The payee, as holder, is allowed to sue the anomalous indorser as second indorser, and the objection that he cannot recover on the ground that he in turn would be liable as first indorser, is answered by saying that that defence of avoidance of circuitry of action is not available, inasmuch as the circumstances of the indorsement show that the anomalous indorser was not to hold the payee.<sup>1</sup> Professor Ames, in his summary,<sup>2</sup> states it more simply: "The payee as holder, may obviously indorse the instrument to the surety without recourse, and may also fill up the blank indorsement of the surety to himself. In this way the parties are placed in the same position as if the maker had, in the first instance, delivered the note to the payee, the payee had then indorsed it without recourse to the surety, and the surety had then indorsed it to the payee. In both cases the payee, as second indorsee, charges the surety as second indorser." It has been hinted as an objection to this, that the payee has no authority to indorse "without recourse;" but the answer is that it is not a question of having authority at all. The payee is allowed to bring out matter which will prevent the anomalous indorser from setting up the defence of circuitry of action; and indorsement "without recourse" is nothing more than a convenient way of putting down this result. And if it be said that this is really introducing parol evidence to vary a written contract, the answer is that it is not a matter of evidence: the payee may bring in under an equitable defence the same matter which, before the introduction of equitable defences, would have entitled him to an injunction preventing the anomalous indorser from suing him as first indorser; and, certainly, he may prove his case.

Settling ourselves down, then, upon the fact, as it seems proper we may, that the payee as second indorsee may hold the surety as second indorser, and remembering also

<sup>1</sup> *Moore v. Cross*, 19 N. Y. 227 (1859).

<sup>2</sup> 2 Ames, B. & N., 838.

that notice is necessary to charge an indorser, we are in a fair way to examine the cases with some sense. Our first refreshing surprise is to find how few and of what sort the authorities are; in perhaps not more than four cases was the question involved and in those the discussion is not apt to meet with approval.

In every other case there is something distinguishable. In the cases in which there was no demand or notice it was proper not to hold the defendant. Such were *McCune v. Taylor*,<sup>1</sup> and *Barto v. Schmeck*.<sup>2</sup> Such, probably, we may also take *Schollenberger v. Neff*,<sup>3</sup> and *Fegenbush v. Lang*,<sup>4</sup> to be from the mere fact that it does not appear that there was notice, and although the defendants in both cases were held, the result is unsatisfactory and must be due to starting with the mistaken notion that guaranty is the proper action. In *Shenk v. Robeson*,<sup>5</sup> and *Jack v. Morrison*,<sup>6</sup> nothing is said about notice. The second simply decides that a mere indorsement is not sufficient writing to satisfy the statute. In all these cases excepting *Shenk v. Robeson*, the action was on a guaranty and any discussion in them would have little weight in an action on an indorsement. Even had there been notice, it would have been a sufficient answer to say that plaintiff has misconceived his action. One case—*Smith v. Kessler*<sup>7</sup>—did say that upon indorsement *alone*, the surety is not liable to the payee. Of course, the payee must meet the defence of avoidance of circuitry of action and so the burden is upon him to show that the surety was not to have recourse to him.

In only one case before *Schafer v. The Bank*,<sup>8</sup> does it appear that the defendant had notice, and in that he was held liable to a holder who took from the payee after maturity.

<sup>1</sup> 11 Pa. 460 (1849).

<sup>2</sup> 28 Pa. 447 (1857).

<sup>3</sup> 28 Pa. 189 (1857).

<sup>4</sup> 28 Pa. 193 (1857).

<sup>5</sup> 2 Grant, 372 (1858).

<sup>6</sup> 48 Pa. 113 (1864).

<sup>7</sup> 48 Pa. 142 (1863).

<sup>8</sup> 59 Pa. 144 (1868).



Inasmuch as the holder took the note subject to equities, the case practically decides that payee may recover.<sup>1</sup>

This, then, is the state of the authorities when we come to *Schafer v. The Bank*,<sup>2</sup> which is considered the leading case—a distinction due, however, not so much to its solid reasoning and faithful examination of the cases as to its presumptuousness in putting itself down as settling the question for all time. Solomon Schafer was the indorser of a note payable to Jacob and Joseph Schafer. The payees, having indorsed below Solomon Schafer's name, had the note discounted at the plaintiff bank, and it was held that plaintiff could not recover, although there was demand and notice. There were two counts—the first was on guaranty; the second charged defendant as second indorser, alleging that payees were first indorsers.

Justice Sharswood was anxious not to depart from the authorities. "Our unanimous conclusion," he says, "is to adhere to these decisions," and he overruled the only case (*Kyner v. Shower*) that was on all fours with the one he was deciding. He goes on, "But were there more doubt as to the soundness of the principle settled in *Barto v. Schmeck* and *Jack v. Morrison* than there is, we ought not now to depart from them," not recognizing that not only demand and notice distinguished the cases, but that those cases were on actions of guaranty, while here there was a count on the indorsement. This failure to apprehend the subject clearly is noticed also in the examination of the cases. *Taylor v. McCune* and *Barto v. Schmeck* and other cases do not have their decisions stated with the exactness we should expect. It is more than doubtful, too, if Justice Sharswood is justified in his criticism of Justice Gibson's remarks in *Kyner v. Shower*. The statement in that case—"and when there is no such proof, he authorizes the payee to write over his name any form of engagement he may see proper"—may be fairly interpreted to be nothing more than a statement of what Justice Gibson himself conceived the law to be rather than a statement of what he supposed *Taylor*

<sup>1</sup> *Kyner v. Shower*, 13 Pa. 144 (1850).

<sup>2</sup> 59 Pa. 144 (1868).



v. *McCune* established. And although it may not be quite accurate, its aspect is considerably altered when it is read in the light of the facts of *Kyner v. Shower*.

From Justice Sharswood's whole discussion it is evident that the case was practically decided on the first count, and that it was assumed that there was no liability on the second. It may be worth while to look into the reason for this assumption. We find, in the first place, that it is traceable in some measure to the introduction of presumptions that seem to serve no purpose but that of confusing the subject. In *Taylor v. McCune*, Bell, J., says of *Tillman v. Wheeler*,<sup>1</sup> which he considers decisive of his case, that it decided that "there was nothing to disprove the legal presumption flowing from the appearance of the paper; that T. put his name to it as second indorser, on the responsibility of the payee, and for the accommodation of the drawers and payee, as first indorser." In this case and its partner, *Herrick v. Carman*,<sup>2</sup> it did not appear that the indorser intended to be anything more or less than a second indorser, with the privileges that go with that position, one of which is to look back to the payee as first indorser. In other words, the payee did not show that there were circumstances which would deny the right of the surety to have recourse to him. There was not this difficulty in *McCune v. Taylor*, for there it appears that Taylor indorsed to give the note credit with the payee; and, therefore, the New York cases were not in point. When nothing appears except the indorsement, it is hard to see what need there is for a presumption; when, on the other hand, it appears that the indorsement was to give credit with the payee, it is contrary to the fact to say that the surety is presumptively a second indorser *upon the responsibility of the payee*. The significant result—and it is perhaps traceable to this misapplication of the New York cases—is that Pennsylvania, while pretending to follow New York, has reached an opposite result—New York having found no difficulty what-

<sup>1</sup> 17 Johns. 325 (1820).

<sup>2</sup> 12 Johns. 159 (1815).

ever, consistently with *Tillman v. Wheeler* and *Herrick v. Carman*, in holding the surety.

Another notion that has helped along this assumption that a surety cannot be held, was introduced in *Barto v. Schmeck*. Woodward, J., says: "There was no proof to charge Barto with liability to the payee, and he could be made liable to Schmeck as a subsequent holder only by the payee's assuming the responsibility of first indorser. . . . It was a fraud on Barto, therefore, for Mannerback (the payee) to indorse below him and to negotiate the note to Schmeck without himself assuming the responsibility of a first indorser. And Schmeck took the note, with his eyes wide open to the fact that Mannerback was the payee and could not regularly be second indorser. This was a circumstance sufficient to discredit the commercial character of the paper and to put Schmeck upon inquiry," etc. The court thought that Mannerback was not first indorser, because he signed below Barto; but is the position of the names to determine whether or no one is a first indorser? It seems it ought to be immaterial on what part of the paper the payee writes his name so long as he puts it down as a first indorsement. In other words, is it not simply a question of what was the payee's intention when he indorsed? It seems so; and hence that intention becomes a matter of inquiry for us. Now, it is surely not easy to impute one or another definite intention to a payee who has indorsed below the anomalous indorser, when we know that he indorsed in a half-mechanical way, as a matter of course in business, without any contemplation of the legal refinements that are likely to arise. On the other hand, however, it is not positively stupid for us to say that he meant his indorsement to be an indorsement, and hence meant it to pass legal title and to make a contract just as other indorsements do. But a payee can transfer legal title only by becoming first indorser, for the reason that otherwise a subsequent holder does not come within the tenor of the bill; and, therefore, the fair and natural interpretation of his act is that he did become first indorser.

A further objection to Justice Woodward's dictum is the disastrous result that would come from following it out logi-

cally. If it is to put a purchaser on inquiry when the payee's name is below that of the anomalous indorser, why not when his name is written across the face or lengthwise on the back, or in any other of the numerous positions that may be imagined? To put him on inquiry in a particular case seems nothing less than arbitrary. And what would the result be but to lessen the freedom of currency of negotiable instruments, while the drift of the law merchant is in the opposite direction.

Sharswood, J., of course, had to admit that if the payee indorsed "without recourse" above the surety, then, as to *bona fide* holders, the surety would certainly be conclusively bound to answer as second indorser; but he claimed that, "if the surety was sued by the payee in the character of subsequent indorser, he undoubtedly could show that in fact such restricted indorsement was not made until after he had signed, and, as to any liability to the payee, it may well be questioned whether it would not be a mere evasion of the statute that was intended to prevent perjuries as well as frauds." According to this the *bona fide* holder may sue the surety, who will then have no recourse to the payee as first indorser "without recourse," or he may sue the payee, who, we may suppose, has also signed as third indorser, and the payee cannot hold the surety; so that it is to depend entirely upon the holder, who is to pay the note—the surety or the payee. The trouble seems to be that Justice Sharswood fixes the liability of the surety to the holder by the law merchant (not incorrectly); but when he comes to the liability of the surety to the payee (as second indorsee), he brings in the statute—for what reason it is not easy to understand.

Only two cases can be said in any way to follow *Schafer v. The Bank*. With the admission in *Murray v. McKee*,<sup>1</sup> that "it was rightly decided if *Jack v. Morrison* is to be considered law" there could, of course, be no other conclusion. The other case is *Hauer & McNair v. Patterson*,<sup>2</sup> in which Sharswood with fatal consistency held that an anomalous indorser

<sup>1</sup> 60 Pa. 35 (1868).

<sup>2</sup> 84 Pa. 274 (1877).

who took up a note could recover against the payee as first indorser, a conclusion the very opposite of which a good case, *Moore v. Cross*<sup>1</sup> says no one would doubt.

The last case, *Arnot v. Symonds*,<sup>2</sup> on anomalous indorsement may be consistent with *Schafer v. The Bank*, but the test which it adopts goes far toward relaxing the doctrine of that case. When Arnot purchased the note the payee's name appeared in the proper place on the back, while that of the anomalous indorser was at the opposite end and inverted with respect to the payees'. It was held that the holder could recover against the anomalous indorser. The court says, "If the defendant, in case he is required to pay, will have recourse to the payees, it follows that he is liable as second indorser to the holder. Whether he would have such recourse or *not* is really the test of liability. . . . The legal effect of placing their (the payees') name where it is, is to make them liable as first indorsers." This test has the advantage of doing away with the subject of inquiry and notice which we have seen occasioned some confusion in the earlier cases. Suppose, for instance, a payee comes to A with a note he has not yet indorsed, but upon which there appears the name of the anomalous indorser, then indorses the note above the anomalous indorser and gets the money from A. According to the test laid down here A may recover, even though he has had notice of the character of the indorsement. But, however satisfactory the test may be in such a case, the objection to it is that it will not work where the payee indorses "without recourse" above the name of the surety; for the surety will not then have recourse to the payee, and yet it can hardly be doubted that he would be liable to a *bona fide* holder. A further objection to the reasoning in this case is the arbitrariness with which the rule is laid down that the liability of the indorser depends upon the position of the payee's name. That is, if the payee indorses in position A, the surety is to be held; if one or two inches from position A, he is not to be held. When recovery thus becomes a matter of inches it seems you are

<sup>1</sup> 19 N. Y. 227 (1859).

<sup>2</sup> 85 Pa. 99 (1877).

getting pretty close to the borderland of absurdity. But besides this there is the difficulty in applying such a rule. Suppose the payee's name were below that of the surety, but in the right direction, while that of the surety is inverted, or suppose payee wrote his name lengthwise along the back, will the test help you very much in determining whether or no payee is first indorser? The simple and workable rule is to say that it is immaterial where payee writes his name; however inartistic its position with reference to other names, it is still a first indorsement if meant to be such.

We have noticed that it seemed improper and confusing in such cases as *Barto v. Schmeck* and *Schafer v. The Bank* to say that the position of the name of the first indorser below that of the second was sufficient to put plaintiff upon inquiry. A case—*Loosee v. Bissell*<sup>1</sup> now came up in which that question would seem, upon first blush, to have been correctly introduced. The payee of a note that had been indorsed by an anomalous indorser pledged the note as collateral security with the plaintiff bank, but did not indorse it; subsequently he had it discounted by the bank and then indorsed it. The bank was not allowed to recover on the ground that the facts were sufficient to put it upon inquiry. Of course, a transferee of a note is taken to have notice of what appears on the note, and in that sense it can, indeed, be said that the holder here was put upon inquiry. But that inquiry would develop the fact merely that the transfer of the note without indorsement of the payee would operate only as an assignment of the payee's interest, and that that interest from the very face of the paper could be nothing more than a right against prior parties. In other words there was no assignment in any sense of any right—legal or equitable—against the surety, and it is irrelevant, therefore, to bring in any talk of notice of equities that he may have against the payee. More than this, it seems quite inaccurate to speak of the equities of the subsequent holder against the payee. An indorser always recovers on his legal title and the question strictly is not whether he has

<sup>1</sup> 76 Pa. 459 (1874).

an equity against the payee, but whether the payee has an equitable defence to the legal action. The defence to plaintiff's action here was *not* that he had *notice*, but that he had not given *value*. The money that he paid in the first instance was in consideration of what was then assigned him, and at that time he got no right against the surety. True, the subsequent indorsement by the payee gave him legal title, but at that time he gave no value for the right, and hence is not a purchaser for value.

A few more cases are usually cited under the head of anomalous indorsement that have no business to be. *Eilbert v. Finkbeiner*<sup>1</sup> merely decides that you may prove a guaranty if you have a writing. In *Temple v. Baker*,<sup>2</sup> the question was simply whether there was a memorandum in writing sufficient to satisfy the statute.

In *Slack v. Kirk*,<sup>3</sup> the discussion of anomalous indorsement with the subsequent supposedly necessary adherence to *Schafer v. The Bank*, gives an awkwardness to the case from which it ought to be free. Slack, the payee, indorsed the note as first indorser. Subsequently, Kirk indorsed the note, but inadvertently wrote his name above that of the first indorser. It was held that Kirk, who when the note fell due paid half of it to the subsequent holder, could not recover from Slack. The theory of the court was that Kirk could be subrogated to the rights of the holder and so recover from Slack, while Slack could not hold Kirk because Kirk was an anomalous indorser. The result was satisfactory; the theory, rather otherwise; for the case seems capable of the simple explanation that a second indorser may hold a first. The contention that this is not so when the name of the second appears above that of the first seems so weak that one hardly stops to consider it. If an answer were needed it would be sufficient to say that it can be shown by parol matter that the second indorser put his name above by mistake.

The latest case cited under anomalous indorsement is *Cen-*

<sup>1</sup> 68 Pa. 243 (1871).

<sup>2</sup> 125 Pa. 634 (1889).

<sup>3</sup> 67 Pa. 380 (1871).

*tral National Bank v. Dreydoppel*.<sup>1</sup> A note was made by J. & E., payable to their own order, and indorsed by defendant, and subsequently by the makers themselves. The court accounts for the refusal of the cases to allow recovery against the anomalous indorser on the ground that he had no recourse to the payee; but it contends that the reason fails in the present case because he has recourse to the payees as makers, and that he should therefore be held. Again the result is correct, but again the question of anomalous indorsement has no business to be discussed. A man cannot promise himself, and so a note payable to the maker is incomplete—is not a note and does not become such until after the maker indorses it. At that time the effect of the indorsement is to make a contract with the indorsee and so complete the note.<sup>2</sup> This indorsement, however, is not a strict indorsement, for that is a transfer or pre-existing liability, and here there is no such liability. The maker, by putting his own name down as payee, reserves the designation of the payee for a future time and his subsequent indorsement is merely this designation of the payee; so that the apparent anomalous indorser is really the first indorser, and hence there is nothing irregular about the note.

I have gone into the cases sufficiently, I think, to show that they are, at least, not very satisfactory. In not one of them does there seem to be a clear apprehension of the subject; in most of them anomalous indorsement did not require discussion; in those that it did the reasoning could be sounder. And it is more than just possible, too, that it may be fairly said that it has really not been settled in Pennsylvania that an anomalous indorser who gets notice cannot be held. It is certain, at any rate, that the authorities are in such a shape that *stare decisis* loses much of its nightmare effect. That principle, after all, it may sometimes be only the next best thing to follow with conscious blindness; the *very* best thing may be to disregard it intelligently.

*George Stern.*

Philadelphia; March, 1899.

<sup>1</sup> 134 Pa. 499 (1890).

<sup>2</sup> *Hooper v. Williams*, 2 Exch. 18.

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### CARRIERS.

The word "cars" in a Wisconsin Statute, giving a right of **Hand-cars** action to railway employes injured by fellow-  
**are "Cars"** servant's negligence (L. 1893, c. 220), was held to include hand-cars: *Benson v. Chicago, St. P., M. & O. R.* (Sup. Ct. of Minnesota), 77 N. W. 798.

A bought a mileage book, containing a clause of forfeiture for use by any other than the purchaser, with money furnished by a ticket "scalper," paid him for the part she **Forfeiture of**  
**Mileage Book** had used, and delivered to him the unused por-  
**for Unlawful** tion. She afterwards attempted to take a second  
**Use** trip on the same book, but in the meantime another person had used it, and on evidence of this the railroad company had listed the ticket as forfeited. A was accordingly compelled to surrender the book and pay fare under pain of being put off the train. On action by A against the railroad, A and the scalper agreed, in testifying, that no authority to permit others to use the ticket had been given by A. Held, that the ownership of the mileage was for the jury, and that if the title to it remained in A, and she gave no license to others to use it, the ticket was not forfeited. Judgment for A affirmed. *Mueller v. Chicago, B. & N. R.* (Sup. Ct. of Minnesota), 77 N. W. 566.

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#### CONSTITUTIONAL LAW.

An injunction against a criminal prosecution, in a state **Federal Court,**  
**Jurisdiction,** court under a valid state law, of a bank officer for  
**Receiver of** embezzlement, cannot be granted by a Federal  
**National Bank** court because the latter had previously obtained jurisdiction in equity cases in which a receiver of the bank had been appointed and the civil liability of such officer was in litigation: *Harkrader v. Wadley*, 19 Sup. Ct. 140.

In *Howell v. Miller et al*, 91 Fed. 129, the Circuit Court of



**Suit to Protect  
Copyright,  
Infringement  
by State  
Authority,  
Eleventh  
Amendment** Appeals decides (1) A compiler and publisher of an annotated edition of the statutes of a state may copyright his work, and such copyright will cover and protect such part of the contents as is the product of his own labor. (2) A suit to enjoin the publication, distribution and sale of a similar work, on the ground that it infringes such copyright, is not a suit against the state within the purview of the Eleventh Amendment, U. S. Const., because the matter for such publication was prepared under direction of a state statute, and is owned by the state and in its possession, and the defendants are officers and agents of the state, and proceeding in accordance with such statute.

**Impairment of  
the Obligation  
of Contracts** *Board of Commissioners of Wilkes County v. Call* (Supreme Court of North Carolina), 31 S. E. 481, is a late case of bond repudiation. The bonds were declared void, against the dissent of two justices, on various technical grounds, among which was the fact that the vote on the second reading of the act authorizing the loan was not recorded in the journal of the legislature. "There can be no *bona fide* holders of unconstitutional obligations," says the court, "nor can ignorance of public statutes and legislative journals be deemed otherwise than wilful or negligent."

**Line of State  
Decisions Held  
a "Law"** A decision precisely similar to this (*Union Bank v. Board of Comr's*, 119 N. C. 214. 25 S. E. 966) was held by District Judge Purnell (*Bank v. Board*, 90 Fed. 7, E. D. of N. C.) *to govern only for the future*. Its application to contracts entered into previously was considered by the learned judge unconstitutional, as being *legislation* impairing the obligation of contracts. Former decisions had established the law in North Carolina that "the copy of an act, attested according to law by the presiding officers of the two houses of the legislature and filed in the office of the Secretary of State," constituted "conclusive proof of the enactment and contents of the statute of the state," not to be attacked "by the legislative journals or in any other manner." This "law" of the state could not be "repealed" by judicial decision so as to invalidate contracts already formed.

This decision of the Federal court goes very far, but not farther than *Pease v. Peck*, 18 How. 599 (1855). In the latter case the act in question was never passed by the legislature, but was engrossed by a clerk's mistake. For a number of

CONSTITUTIONAL LAW (Continued).

years the state courts treated the statute as valid, but later discovered the error, and declared the law void *ab initio*. This decision, in its application to contracts entered into on the faith of the original construction, was reversed by the United States Supreme Court.

In this connection especial interest attaches to the last Virginia coupon case, *McCullough v. State of Virginia*, 19 Sup. Ct. 134. The Supreme Court of Virginia declared unconstitutional *in toto* the Act of 1871, which made bond coupons receivable for state taxes and gave rise to the whole brood of cases of which this is the latest, and accordingly denied remedy to a bondholder, McCullough. The court, in taking this action, made no mention of the Act of 1887, under the authority of which the state officers refused to receive the coupons in payment of taxes. Nevertheless, the United States Supreme Court granted a writ of error to the Supreme Court of Virginia, on the ground that the latter's action impaired the obligation of McCullough's contract. As Mr. Justice Peckham points out, in his dissenting opinion, this furnishes the first instance of the granting of such a writ under the contract clause, where the state court had not *upheld a state statute*, which was alleged to impair the obligation of a contract. To be sure, the majority asserts this case to be *practically giving effect* to the Act of 1887, while not nominally doing so. But the view in the dissenting opinion seems the more rational, and it is hard to avoid the conclusion that the rule of *Gelpke v. Dubuque* has in this case been extended, and that settled judicial construction of a state law is here considered part of the statute for the purpose of giving jurisdiction by the subject-matter, just as before it had been considered part of the statute for the decision of a case, after the Federal jurisdiction had been conferred by citizenship.

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CONTRACTS.

In *Moffett, Hodgkins & Clark Co. v. Rochester* (Circuit Court of Appeals), 91 Fed. 28, the plaintiffs filed a bill for a rescission of a contract awarded to him for public work, on the ground of mistake, in that they had made an erroneous estimate of the cost of a certain tunnel excavation by omitting to take into consideration certain features of the work, thereby making his bid \$27,000 less than it should have been. The court dismissed the bill on the

## CONTRACTS (Continued).

ground that the alleged mistake lacked two elements essential to render it one for which rescission would be granted; first, it was not mutual, and, second, plaintiff was not free from negligence.

A and B entered into a written agreement to embark in a joint venture in the purchase of stocks, B to furnish the capital to carry on the business, to share equally in the profits, and in case of loss to be reimbursed not only to the extent of the full amount of his investment, but to receive a sum in excess of legal interest thereon. Held, it not being shown that the agreement was a device to conceal a loan of money, that the contract was not usurious: *Orviss v. Curtiss* (Court of Appeals of New York), 52 N. E. 690.

On appeal from a judgment against B on a bail bond, B contended that there was no consideration for the bond, inasmuch as C, for whose appearance the bond was given, was at the time of his escape under arrest for another offence. Held, affirming the judgment, that the discharge from custody for the offence for which the bail was given was sufficient consideration for the bond, though the offender was in custody for another offence until his escape: *Dunlap v. State* (Supreme Court of Arkansas), 49 S. W. 349.

## CORPORATIONS.

*National Bank v. Illinois & W. Lumber Co.*, 77 N. W. 185 (Supreme Court of Wisconsin), is to be added to the list of decisions which recognize that it is only on the ground of fraudulent overvaluation of the property that the stock issued in exchange for it can be treated by creditors as not fully paid. The court cites, with approval, the well-known decision of the Supreme Court of the United States in *Coit v. Amalgamating Co.*, 119 U. S. 343.

Ignoring for a moment the "corporate entity," we cannot but regard stockholders as partners with limited liability. Hence, we conclude (1) that a stockholder who has been induced by fraud to subscribe to stock, has an equity of rescission against his associates; (2) that his equity will not, however, avail against the legal right of a corporate creditor, who is in substance the creditor of all who are stockholders when his

CORPORATIONS (Continued).

debt accrues; (3) that the liability of a stockholder to respond up to the par value of his stock is the same thing (within limits) as the liability of the partner to respond for firm debts to the full extent of his resources; (4) that as a private agreement of indemnity is enforceable between partners, so an agreement that a stockholder shall not be liable for the par of his stock is valid, except as against corporate creditors; and, therefore, is not of such a character as to deprive him of his equity of rescission under the circumstances above stated. This is all that there is (except a point of equity pleading) in such a case as *Barcus v. Gates*, 89 Fed. 783 (Circ. Ct. of App. 4th Circ.). The court, however, being sadly hampered by the artificial reasoning to which long familiarity with the "entity" has accustomed us, labors hard to reach the proper result, and does so only after a toilsome journey.

In *Rowe v. Leuthold*, 77 N. W. 153, the Supreme Court of Wisconsin deals another blow at the obsolescent "trust fund theory" by remarking that "it is true that the mere fact of the insolvency of a corporation does not convert its property into a trust fund for the benefit of all its creditors, so as to prevent one of them, without fraud, from obtaining a preference by ordinary adversary proceedings." This must involve the concession that a corporation may prefer a creditor. The court, however, refuses to recognize the right to prefer a director who is a creditor. The case before the court was a case of trickery and sharp practice upon the part of the favored director. It is to be regretted that the court did not rest its decision on the ground of fraud. It seems impossible to sustain the principle as broadly as the court undertook to state it.

**Insolvency,  
Preference of  
a Director**

Although the stock of his corporation was fully paid, a stockholder, who voluntarily discharged a corporate debt, asserted an equity of contribution against his fellow-stockholders. The court denied his right. *Gorder v. Connor*, 77 N. W. 383.

CRIMINAL LAW.

In *Queen v. Ellis*, [1899] 1 Q. B. 231, false representations had been made in Glasgow, but the goods were obtained in England. Held, that the offence consists in obtaining the goods, and not in making false pretences whereby they might be obtained, and,

**Jurisdiction,  
False  
Pretences**

## CRIMINAL LAW (Continued).

therefore, the English court had jurisdiction to try the charge of obtaining goods by false pretences.

Who is a fugitive from justice was the question involved in *In re Maney*, 55 Pac. 930, which was before the Supreme Court of Washington. The petitioners were convicted of murder in Idaho, and sentenced to imprisonment in the penitentiary of that state. In going from the place of trial to the penitentiary, in custody of an officer, they were compelled, by the topographical condition of the country, to pass through a portion of another state. When in this portion they applied for their release on *habeas corpus*, on the ground that the officer had no authority to detain them in that state. Held, they were not fugitives from justice, but convicted persons under a judgment of a court of a sister state to which full faith must be given. Remanded to the custody of the officer.

## EQUITY.

The case of *Coons v. Christie*, 53 N. Y. Suppl. 668, carries the use of the injunction in labor disputes further than any case which has come to our notice. The court would seem to hold that one may be restrained by injunction from asking another to break his contract with the plaintiff, thus not only following the doctrine of *Lumley v. Guy*, 2 E. & B. 216, but preventing the breach of duty recognized in that case, by an injunction. The court, however, put their decision on another ground. The defendant had, as an officer of a union, ordered the employes of the plaintiff to stop work. The decision granting the injunction is apparently placed on the ground of an organized interference with the plaintiff's business. This idea underlies Mr. Justice Harlan's opinion in *Arthur v. Oakes*, 62 Fed. 321, where he held a strike in itself illegal as a combination to injure another. Compare, also, *Farmers' Loan and Trust Co. v. North Pacific R. R. Co.*, 60 Fed. 803. The principle of law would seem to be that all combinations which injure the business or property of another are unlawful. It need hardly be pointed out that if actors and the injured party are competitors in trade, this principle is not law. Where the actors are workmen, and the injured employers, it is in this country rapidly tending to become law. Compare *Allen v. Flood*, [1898] A. C. 1; *Davis v. Engineers*, 51 N. Y. Suppl. 180; and the opinion of Holmes, J., in *Veghlahan v. Gunter*, 44 N. E.

**EQUITY (Continued).**

(Mass.) 1077. The second case deals with the principle of *Lumley v. Guy*, the third with harm which one may do to another with impunity, and *Allen v. Flood*, more or less with both questions.

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**GUARANTY.**

Ordinarily an agreement with a bank to be responsible for the payment of notes of a third person which it may endorse, is a continuing offer, which may be withdrawn as to  
**Withdrawal** any subsequent notes by notice. *Home Savings Bank v. Hosie*, 77 N. W. (Mich.) 625, was a case of this kind, where the directors of a company had executed their bond to the bank for indorsements to be made during the ensuing year. It was held, under all the circumstances, and especially because the bond was only a substitute for another, the consideration for which had been executed, that it was not revocable by notice, and, therefore, not by the death of one of the obligors.

*Lehigh Coal and Navigation Co. v. Blakeslee*, 41 Atl. (Pa.) 992, decides that a guarantee of the validity of a signature  
**Statute of Limitations** to a power on a stock certificate is a contract from the date thereof, and an action cannot be maintained upon it on proof of its forgery after seven years.

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**HUSBAND AND WIFE.**

Iowa is one of those states where cruel and inhuman conduct must endanger life in order to constitute a ground for divorce. *Blair v. Blair*, 76 N. W. (Ia.) 700, is  
**Divorce, Cruel and Inhuman Treatment** a good illustration of how far such conduct may go without authorizing the court to separate the parties—even to hiring a man to compromise his wife's chastity. The existence of such a case is a strong argument in favor of moderately liberal divorce laws.

*Driver v. Driver*, 52 N. E. (Ind.) 407, holds that, for a married man falsely to deny the paternity of his wife's  
**Cruelty** child, is such cruelty as will entitle her to divorce.

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**INNKEEPERS.**

In the case of *Turner v. Stafford*, 9 Pa. Super. Ct. 83, it was decided that the absence of a guest all night  
**Guest, Absence from Room, Negligence** from a room engaged by him at a hotel is not such negligence on his part as will bar his right to recover the value of property stolen.

**MASTER AND SERVANT.**

*Wabash R. Co. v. Kelley*, 52 N. E. (Ill.) 152, was a case in which a railroad company had deducted a certain monthly sum from the wages of an employe for the purpose of maintaining a hospital for the care of injured employes. It was held that, so far as the management of the hospital was concerned, the company was like any other principal, liable for the acts of its agents, and hence liable to one who suffered an unnecessary amputation by a surgeon, employed by the company, who was under the influence of narcotics.

Hospital for  
Railway  
Employes,  
Management

The general principle of the duty of a master to furnish his servants with a safe place to work and proper tools, etc., is well settled. The difficulty in applying it is seen in *Lake Erie & W. R. Co. v. Morrissey*, 52 N. E. (Ill.) 299. The plaintiff's ground of complaint was that the company had neglected its duty of leveling the track at switching points, and that plaintiff had been injured thereby. A judgment for plaintiff was affirmed on the ground that there was evidence to go to the jury. Plaintiff escaped the ordinary defence of having voluntarily undertaken the risk in question by proving that it was his first trip as conductor to that place.

Safe Place to  
Work,  
Railway  
Track

**MORTGAGES.**

*Webber v. Lawrence*, 77 N. W. (Mich.) 266, is an instructive case. Lawrence, holding title to property subject to a \$15,000 mortgage in favor of Webber, deeded it to Corning, who by the deed assumed the payment of the mortgage debt. A contemporaneous written agreement disclosed, however, that the transaction was merely to secure Corning for indorsing a note of Lawrence's, who, by the agreement, was to retain possession of the premises and apply the income to the payment of the loan and mortgage. In a foreclosure suit by Webber it is now held that he is not entitled to a personal decree for deficiency against Corning; he has no contract with him, himself, and his right through Lawrence is subject to the defence that could be set up in a suit brought by Lawrence himself, to wit, that Lawrence had not performed his part of the contract. See *Garnsey v. Rogers*, 47 N. Y. 233; *Gaffney v. Hicks*, 131 Mass. 124.

Assumption,  
Defence

The familiar rule of negotiable paper, that its transfer carries with it an implied warranty that the paper is genuine, was



**MORTGAGES (Continued).**

**Assignment,** applied in *Waller v. Staples*, 77 N. W. (Ia.) 570,  
**Warranty** to a mortgage. The second assignee of a mortgage was there held entitled to recover against the first the loss accruing, by reason of the fact that the mortgage was a forgery.

*Long v. Landman*, 76 N. W. (Mich.) 374, is a recent illustration of the principle that, where an executor has obtained **Mortgage by** authority from a court to mortgage his testator's **Executor** estate, the mortgagee has a right to rely upon the real facts set forth in the petition; and these facts, if sufficient to confer jurisdiction on the court, cannot subsequently be denied by the heirs in a suit to foreclose the mortgage. If this were not so, it would practically be impossible for an executor to borrow any money on a mortgage.

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**MUNICIPAL CORPORATIONS.**

In an action against a city for maintaining a nuisance in depositing, near the premises of the plaintiff, garbage gathered from the public streets, the court affirmed **Nuisance,** a judgment for plaintiff: *City of Albany v. Slider*,  
**Liability** (Appellate Court of Indiana,) 52 N. E. 626. The rule that a municipal corporation cannot escape liability for maintaining a nuisance, under the plea that the nuisance was created in the discharge of its duty to the public, is now well settled: *Haag v. Commissioners*, 60 Ind. 511; *Petersburgh v. Applegarth*, 28 Gratt. 321; *Brayton v. Fall River*, 113 Mass. 218; *Hannibal v. Richards*, 80 Mo. 530; Wood on Nuisances, sec. 742.

*Electric Power Co. v. Mayor of City of New York*, 55 N. Y. Suppl. 460. In this case the electric company had illegally erected wires upon housetops. The city authorities cut down and removed the wires without **Removal of** notifying the company to remove them. Held,  
**Electric Wires** that the city was liable for conversion in removing  
**Illegally** the wires, although illegally placed, without notifying the  
**Placed** company, and without offering the company a reasonable opportunity for reclaiming them.

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**NEGLIGENCE.**

The rules of law applicable to the case of *Laidlaw v. Sage*, have at last been clearly enunciated by the New York Court



## NEGLIGENCE (Continued).

**Proximate Cause, Dynamite Explosion, Use of a Human Being as a Shield** of Appeals in 52 N. E. 679, and the result reached is substantially the same as when the case was first tried, and the complaint dismissed because there was no connection or, at least, not the necessary connection between the act of the defendant, Sage, and the injury of the plaintiff; in other words, that the act of the defendant was not the proximate cause of the injury to the plaintiff. The facts of this long protracted case were: In December of 1891, one Norcross entered the office of Russell Sage, carrying in his hand a carpet bag, and handed a note to Sage which, in substance, stated that there was ten pounds of dynamite in the bag, which, if dropped on the floor would blow up everything in the place. It then continued, "I demand \$1,200,000, or I will drop the bag." Sage parleyed with him, and Norcross, evidently believing that Sage did not intend to comply with his demand, caused the explosion to take place. Norcross was blown to pieces, one of the clerks was killed, and everything in the office was shaken up. The plaintiff entered the office a short time after Norcross, but before the explosion, and claims that Sage caught hold of him and moved him about the width of his body, or about eighteen inches, thus bringing him between Sage and Norcross, and he was in this position when the explosion took place. The plaintiff received a severe injury and he brought this action for damages against Sage. At the first trial the case was dismissed because there was, in the opinion of the trial court, no relation of cause and effect. This was reversed by the Supreme Court, they holding that no question of proximate cause was involved. After four trials and the questions being passed upon by the Supreme Court three times, the Court of Appeals decides that there was no relation of cause and effect, and practically take the same grounds as the original trial court, so that, after all these years of litigation, the plaintiff's claim is practically dismissed. It is true that the judgment was reversed and a new trial ordered, yet the view that the court took of the evidence, puts an end, in all probability, to the case, unless some new evidence is discovered. The court did not rest its opinion upon the question of proximate cause alone, yet it is very apparent that that was the determining factor in the decision, and it was based upon the fact that plaintiff would have been injured if Sage had not moved him, because everybody in the room was injured.

## PARTNERSHIP.

In order to enforce a partnership liability against one who has, in fact, ceased to be a partner, it must, on principle, appear that the plaintiff has been misled to his disadvantage by the defendant's "holding out." Whatever doubts may have been cast by the New York courts upon the soundness of this proposition by the decision in *Poillon v. Secor*, 61 N. Y. 456, may be regarded as set at rest by *Bank v. Walker*, 66 N. Y. 424, and by *Lanier v. Milliken*, 54 New York Suppl. 424. See the remarks of Gray, J., in *Thompson v. Bank*, 111 U. S. 530.

## PLEADING AND PRACTICE.

The Court of Appeals of Colorado has decided that if a sheriff's return of service be false, and not the result of any misconduct of the plaintiff, its falsity may be shown by the party injured, in a proceeding to vacate the judgment. This is broadly contrary to the old rule, that as between parties and privies the return of the sheriff was conclusive, and that it could not be questioned, except in an action against the officer for a false return. The court further held that the unauthorized appearance of an attorney for a defendant, without the latter's knowledge, does not confer jurisdiction. These are definite rulings upon points of practical importance that have been debated in other forums.

In this connection it is interesting to read the opinion of Judge Mitchell, of the Supreme Court of Pennsylvania, in *Price v. Schaeffer*, 161 Pa. 530, under the 1st Section of Art. 4, of the Constitution of the United States, where the position of the plaintiff in the judgment, both by the organic law and by many judicial interpretations, would seem to be very strong in an action upon a judgment entered in the court of another state. It was held, in this Pennsylvania case, that an affidavit of defence to such an action is sufficient which avers that the appearance recited in the record of the judgment sued on was merely constructive, and that, in fact, the defendant was not served with process, did not appear, and had no knowledge of the suit until recently, when demand was made, in Philadelphia, upon him for payment. See also *Bodurtha v. Goodrich*, 3 Gray, 508, in which it was held that, in the absence of personal notice or service, a mere recital that the defendant appeared by attorney was not absolutely binding, and did not

## PLEADING AND PRACTICE (Continued).

preclude him from showing that the attorney was not retained or authorized. Said Shaw, C. J.: "It would be reasoning in a circle, and inconclusive, to say, that the court had jurisdiction, because it was shown by their record that the defendant appeared by attorney; and that they had authority to make such record, binding upon him, because they had jurisdiction:" *Du Bois v. Clark*, 55 Pac. 750.

## REAL PROPERTY.

In *Boyd v. Bloom*, 52 N. E. 750 (Ind.), it was held that the grant of "a free and undisturbed right to the use" of a certain way does not give the grantee a right to an **Easement,** open way, these words not amounting to the grant of an open way. The plaintiff in this case objected to the placing by the defendant of gates at either end of the way. The general rule is that the grant of a way does not take away the right to place gates thereon which the grantee must open and close when he uses the way. The language must be express and explicit to take away this right: *Bean v. Coleman*, 44 N. H. 539; *Short v. Devine*, 146 Mass. 119; *Green v. Goff*, 153 Ill. 534; *Hartman v. Fick*, 167 Pa. 18; *Kohler v. Smith*, 3 Pa. Super. Ct. 176; Jones on Easements, §§ 400-1, 405, 406. In *Connery v. Brooke*, 73 Pa. 80, the words "free right of passageway with free ingress and egress at all times" was held not to imply that a gate across the way granted was an obstruction.

## SALES.

A, a wholesale dealer, shipped goods to B, a retailer, at various times, the bills being marked, "Consigned; our property until paid for." He knew that the consignee mingled the goods with his general stock, and retailed them in his business when and as he pleased and at his own prices; nor did he require the latter to make any report of such sales, nor keep any separate inventory or account of such goods, they being paid for out of the general proceeds of the retailer's business. Held, that A retained no title as against an assignee for creditors of B: *Mayer v. Catron* (Court of Ch. App. of Tenn.), 48 S. W. 255.

## TELEGRAPH COMPANIES.

In an action by A against a telegraph company for damages occasioned by negligence in the transmission of a mes-

TELEGRAPH COMPANIES (Continued).

**Improper Transmission of Message, Contributory Negligence** sage, it appeared that the message, when received by A, was considered by him as of doubtful meaning, and that he asked the agent of the defendant company if it was correct, and was informed that it had been repeated and was correct. Held, that A was not guilty of contributory negligence as a matter of law: *Hasbrouck v. Western Union Tel. Co.* (Supreme Court of Iowa), 77 N. W. 1034.

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TRUSTS.

**Liability of Trustees** With two dissenting voices the Supreme Court of Missouri has held that a trustee of a private charity, who becomes trustee by virtue of holding a public office, can appoint another to fulfill the duties of trustee, and, if the appointment is carefully made, is freed from all further responsibility for the care of the trust property. Here a testator directed that \$10,000 should be paid to the judges of the county court, to invest the same on good security and apply the proceeds to certain designated charitable purposes. The judges ordered that the fund be received by the county treasurer. Successive county treasurers took care of the property for twenty-five years and made periodical reports to the court. Then a treasurer was elected who misapplied the property. Before his election his reputation had been good. Suit was brought to determine if the judges in office at the time of the treasurer's misappropriation were liable for the loss to the trust property. The decision, as indicated, was in favor of the judges: *Anderson v. Roberts*, 48 S. W. 847.

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WAREHOUSEMEN.

**Bailment, Lien** In *New York Trust Co. v. Lipman*, 52 N. E. 593, the Supreme Court of New York held that where a warehouse gave a depositor open, negotiable receipts for bales of goods deposited, deliverable only on the return of the receipts, and, according to their custom, held the number of bales called for against such receipts without agreeing to deliver any particular bales, and the depositor, after pledging the receipts without notice to the pledgee, withdrew the bales first deposited and replaced them with others of equal value, the lien of the pledgee was transferred to the new bales, and the release of the old bales constituted a valuable consideration for subjecting the new ones, as deposited, to the same lien.

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INSURABLE INTEREST IN LIFE ; CREDITOR'S POLICY ; VALIDITY. The Supreme Court of Georgia has delivered an exhaustive opinion in the case of *Exchange Bank of Macon v. Loh*, 31 S. E. 459 (1898), discussing the nature of a creditor's policy of life insurance and the *quantum* of the insurable interest. The facts were briefly these: Hudgins gave the bank certain mortgages on his property as security for his indebtedness. He assigned likewise two policies on his life and continued to pay the premiums himself. Subsequently he applied for another policy for his own purposes, but the company sent two, both payable to his estate; as he declined to accept the additional one on account of the expense involved in carrying it, the bank assumed it, whereupon Hudgins accepted it

and executed the necessary assignment in due form. It was distinctly understood by all parties that the bank took the policy solely for its own protection as a creditor and that Hudgins was in no-wise liable for any premiums upon it. The bank paid all the premiums accordingly. Hudgins died insolvent, and his administrator filed a bill praying that the assets of the estate be marshaled. A net balance was due the bank, after deducting the proceeds of the policies first mentioned and the proceeds of the mortgages; the bank proposed, therefore, to pay this out of the net proceeds of the last mentioned policy and then to retain the balance of the fund as its own. The court, however, ordered the net proceeds of all the policies to be applied first to the indebtedness and to the cost of the policies, and the proceeds of the mortgages to be applied to pay the small remaining balance. The effect of such a marshalling was to leave a fund for the general creditors. From this decree the bank appealed.

Had the funds been applied as proposed by the bank, the indebtedness, after the proceeds of the first policies and of the mortgages had been exhausted, would have been a little over \$600; the last policy raised a fund of nearly \$5000. The court felt itself obliged, therefore, to pass upon the nature of the bank's insurable interest and to decide whether or not, under the circumstances, this was a wagering policy.

The nature of a creditor's policy of insurance is first examined; the opinion of the court opens with the preliminary remark that much of the confusion which surrounds this complicated question of a creditor's insurable interest is to be attributed to two erroneous views entertained by quite a number of the most respectable courts and judges in this country—that the contract is not one of indemnity, and that the insurable interest is not confined strictly to the amount of the indebtedness to be secured. There is also the preliminary remark that the form of the transaction is utterly immaterial; the policy may be issued to the insured and by him assigned to his creditor, or it may be payable directly to the creditor as nominated beneficiary. The proposition that life insurance cannot be valid for any purpose but indemnity is asserted most positively. *Godsall v. Boldero*, 9 East. 72 (1807), is cited and approved. In this case, it may be remembered, Lord Ellenborough followed Lord Mansfield's ruling in a question of marine insurance and held it was the indemnity involved which distinguished life insurance from gaming or wagering. The court refers to the fact that *Godsall v. Boldero* was overruled, yet adheres to the rule enunciated in that case. Reference is likewise made to *Bank v. Hume*, 128 U. S. 195 (1888), where a distinction appears to be recognized in the aspects of the question as regards the relations of the assured to the company and to the insured's estate. The court, however, does not suggest the other alternative, *i. e.*, a creditor's policy may be one of indemnity in its inception but afterwards, like any other policy of insurance, it is to be performed regardless of the continuance of the interest.

Having determined the policy to be strictly one of indemnity, the court comes readily to the conclusion that the insurable interest cannot exceed the indebtedness to be secured. The court "wishes to be understood as employing the word 'indebtedness' in a liberal sense and, accordingly, as holding that it may embrace not only a debt or debts actually existing when the insurance is taken out by the debtor or is thereafter assigned to the creditor, but also additional indebtedness to arise upon the making of further loans or advances by the creditor to the debtor; such, for instance, as cash for premiums to be paid in obtaining the policy or in keeping it alive." But the further distinction is made that premiums voluntarily paid by the creditor, without liability on the part of the debtor, cannot be charged against the policy. The decisions upon this much litigated subject are then examined in some detail and shown to be thoroughly conflicting. Those holding the amount of the debt is the limit of insurance are approved. The court next considers the important cases of *Ritter v. Smith*, 70 Md. 261, and *Ulrich v. Reinoehl*, 143 Pa. 238 (1891), which decide that the insurance may exceed this limit, provided there be not a "gross disproportion" between the two. In *Ulrich v. Reinoehl*, Chief Justice Paxson considered the *quantum* of the interest at very great length, as a result of which he elaborated this rule:

"A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount sufficient to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the debtor's expectancy of life according to the Carlisle Tables; but, if such amount be exceeded, the policy may be a wagering transaction."

This opinion is criticised by Lumpkin, P. J., much as it was in this magazine (35 AM. LAW REG. & REV., 179-181). "It is radically erroneous," he declares, "to say that one average man has a greater or less chance to live out his expectancy than another." The same conclusion is reached also, as in the article cited, that under the doctrine announced in Pennsylvania there can be no such thing as a wagering policy. *Amick v. Butler*, 111 Ind. 578 (1887), a case very much in point, is then examined, and the award of the fund to the creditor disapproved. The opinion then suggests that many of the policies thus litigated should have been treated as nullities and the courts should not have lent their assistance either in compelling the insurance companies to pay or in determining the title to proceeds paid voluntarily by the insurers.

The principles governing the decision being thus ascertained, it is held the contract was a wager if the bank took the policy solely on its own responsibility, at its own expense and for its own benefit; if, on the other hand, Hudgins assigned the policy as a collateral security for his indebtedness, present or prospective, the transaction was lawful and proper. If the policy were solely for the bank's benefit, the insured's administrator had no status because (a) there was no privity of contract between him and the insurer, and (b) the



courts would not intervene to enforce a wager. An examination of the facts satisfied the court that the purpose of the parties was indemnity and the decree of the court below was confirmed.

Little, J., concurred specially. Life insurance is not, he considers, a contract of indemnity, for "a life is not and cannot of itself be a subject of valuation." At the most, it would seem, the policy is "in the nature of indemnity." As to the *quantum* of the interest, the rule adopted by the majority of the court is pronounced impracticable because of the impossibility of ascertaining the cost of the insurance, to include it in the "indebtedness." The Pennsylvania rule is substantially approved instead. Judge Little insists, likewise, on a distinction between policies assigned to the creditor and those issued directly to him. In the one case he has no rights save under the assignment and that is only to secure the payment of his debt; if the debt be paid prior to the debtor's decease, the assignment has no further validity, the original contract is enforced and the beneficiary will receive the fund. On the other hand, where the contract is with the creditor, the debtor and his representative had no interest in it under any circumstances and cannot assert a claim to the proceeds.

The questions involved in this case have been discussed at such length in this magazine by the present writer, ("Insurable Interest in Life," Vol. 35, pages 65 to 87 and 161 to 183), that it is not now proposed to examine them very fully. The court, we may add, cites this article among its authorities.

Lumpkin, P. J., does not recognize the distinctions generally drawn between policies on one's own life and on the life of another than the assured. Certainly, in an ordinary case, it will make no difference to a creditor whether he himself takes out the policy or receives an assignment of one then taken out by the insured; yet, as Little, J., points out, the two are not identical because of the difference in the parties to the original contract. A further distinction between them is that one is issued on the interest of the assured, the other on the insured's interest in his own life. Such an interest in his own life is necessarily present and we may well conceive of its *quantum* being limited as is the *quantum* of one's interest in the life of another. The writer, however, is not aware of any case involving such a limitation. Once a policy has been issued, the further continuance of the underlying interest is generally thought unimportant. After its inception, therefore, the contract ought not to be held one of indemnity. Whether an assignee of a policy issued originally upon a sufficient interest must likewise have an interest, is a question in a measure analogous in treatment to the question whether the beneficiary must originally have an interest. Of course, in some jurisdictions, wagers are unlawful either by the Common Law or by statute. Originally, as has been shown (35 AM. LAW REG. & REV., 67-78, *supra*), contracts of life insurance made without interest were valid at Common Law and were afterwards prohibited only because of the questions of public policy



involved. In the present case the insured was an actor in effecting the insurance. His own prudence should have prevented his incurring any serious risk of murder and his interest alone would have been sufficient in most jurisdictions to sustain the policy.

If the policy was valid, the further question arises as to the ownership of the surplus. Since the assignment was for collateral security and was not absolute, the court's decision is probably in accord with most of the authorities, but this only goes to show how precarious was the bank's position. Its security diminished year by year and at last might well prove an actual source of loss, yet not even the early death of the insured could yield the bank an advantage to compensate it for the risk it had run. Those wishing to pursue the subject further should examine *Bruce v. Garden*, L. R. 5 Ch. App. 32 (1869), and *Crotty v. Union M. Ins. Co.*, 144 U. S. 621 (1891), both interesting and well-considered cases.

Strictly speaking, the two rules formulated in the case to govern the *quantum* of the interest apply only to policies taken out by the creditor or assigned to him absolutely. They appear equally impracticable in operation. The one Judge Little advocates is substantially the Pennsylvania rule criticised by Judge Lumpkin. As the latter very truly says, under it there can never be a gambling contract. In fact it is easy to demonstrate by mathematics that the limit can never be reached, even when the premiums alone are considered and the debt is disregarded. Judge Lumpkin's rule, similarly, is shown by Judge Little to be unsatisfactory. If the insured dies before his expectancy, the creditor may save a part of his security, but even at best only a part. If the payment of premiums continues for three-fourths or seven-eighths of the expectancy, the security must in most cases be wholly lost. Of course, not even the intermediate rule of allowing insurance to an amount exceeding the debt, and then awarding the insured's estate the surplus after repaying the debt and costs, fully meets the case. The truth of the matter, as has been shown, is that insurance to protect a debt is essentially fallacious and the only endeavor must be to find some working rule. Neither of those suggested by the Georgia court is satisfactory; one, because it is wholly inadequate, the other, because of its vagueness. Probably some restraint upon life insurance is needful in addition to those ordinarily imposed by our modern civilization to prevent murder, yet it would seem the law might well be satisfied with any interest, even though small, which would lead a man in good faith to insure another's life.

*Erskine Hazard Dickson.*

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TRIAL BY JURY; COMMUNICATIONS TO JURORS. *State v. McCormick* (Supreme Court of Washington, Oct. 19, 1898), 54 Pac. Rep. 764. The importance of preserving the purity of the trial by jury has led to the establishment of the well-recognized rule that communications between jurors and other persons, bearing upon the cause and working prejudice to one of the parties, invali-

date the verdict. That this rule be enforced with strictness would seem essential to the administration of justice and to the retention of the confidence of the community in this mode of trial. The courts agree upon this point in all jurisdictions. But where such a communication is not positively shown to have related to the cause and to have worked prejudice, though it is probable or possible that such was the case, the courts have rendered conflicting decisions as to the validity of the verdict. In civil suits the general rule seems to be that a verdict which twelve men have rendered under the solemnity of their oaths is entitled to such consideration that something more than mere suspicion of improper influence is required to set it aside. Prejudice to the unsuccessful party must affirmatively appear: *Hamilton v. Pease*, 54 Ill. 225 (1870); *Armleder v. Lieberman*, 33 Ohio, 77 (1877); *Barbour v. Archer*, 3 Bibb (Ky.), 8 (1813); *Blain v. Chambers*, 1 S. & R. 169 (1814); *Jackson v. Jackson*, 32 Ga. 325 (1861). Some cases have gone very far in this direction. In *Baker v. Simmons*, 29 Barb. 198 (1859), there was a direct interference with the jury on the part of the constable having them in charge to induce them to agree upon a verdict in favor of the successful party, and it was held that the verdict should not be set aside on this ground. This case was cited and followed in *Hager v. Hager*, 38 Barb. 92 (1863). In the same state, however, *Nesmith v. Ins. Co.*, 8 Abb. Pr. 141 (1859), a verdict was set aside because a juror listened to statements made by a third party attacking the credibility of defendant's witnesses.

Communications are more closely scrutinized in criminal cases *Morrow v. Commissioners*, 21 Kan. 484 (1879), and while a verdict will never be disturbed where it affirmatively appears that a communication was innocent (*McKenzie v. State*, 26 Ark. 334, 343 (1870)), there are cases which rule that a communication, without more, creates such an unfavorable presumption that unless it is positively shown to be innocent, the verdict will be set aside: *State v. Hascall*, 6 N. H. 352 (1835); *Nelms v. State*, 21 Miss. 500 (1850). A much larger number of decisions hold that the mere fact of such communication will not invalidate a verdict, unless it be made to appear probable that prejudice resulted therefrom: *Martin v. People*, 54 Ill. 225 (1870); *Brake v. State*, 4 Baxt. (Tenn.) 361 (1874); *People v. Kelly*, 94 N. Y. 526 (1884); *Flanagan v. State*, 64 Ga. 52 (1879); *Barlow v. State*, 2 Blackf. 114 (1829); *State v. Cucuel*, 31 N. J. L. 249, 262; *MacKensie v. State*, 26 Ark. 234, 343 (1870). In the last cited case, which was a trial for a capital offence, a bystander handed a juror a slip of paper with writing on it. The Supreme Court on reviewing the case, recognized that the communication was highly improper, but held that as the record showed a want of proof that an improper influence was had on the juror, the verdict should not be set aside. In *Epps v. State*, 19 Ga. 102 (1855), a remark was made to a juror by a person standing near. The court held that in order to

set the verdict aside the defendant must show that the remark was made about the case, and unfavorable to him, at least.

In the principal case, which was a trial for assault with intent to kill, the presiding judge allowed two letters to be delivered to a juror during the trial. The judge, without opening the letters, saw that they were from a considerable distance from the county and had been in transit several days. This was specified as error before the Supreme Court of the state, and on that ground the decision was reversed and the case remanded. Chief Justice Scott, in rendering the opinion of the court, said "It is the intention of the law that jurors in all actions shall be most carefully guarded from outside influences, and while it is probably true in this case that the documents sent in did not influence them in arriving at their verdict, it is possible that they did so. It is certainly conceivable that the envelopes containing the letters might have been opened, and communications to the jury inserted therein, and the envelopes again sealed in such a manner as to escape detection . . . It is not necessary to establish that the letters did contain anything damaging to the defendant. The opportunity was given, and the fact that they might have contained something of the kind is sufficient."

It is believed that the rule laid down in this case is stricter than that of any prior American decision. In *State v. Hascall, supra*, and similar cases which hold that a communication, without more, creates an unfavorable presumption which must be rebutted, it positively appeared that there was such unexplained communication. In the case under discussion it is apparent that, if the letters handed to the juror had not been tampered with (and there was no evidence that they had been), nothing was present to raise a suspicion of prejudice to the defendant. So far as any communication was shown to have been made, it was explained. In order, therefore, to raise the unfavorable presumption, the court must depend upon a double possibility—first, the possibility that there was a communication; and second, if in fact there was a communication, the possibility that it was prejudicial to the defendant. In view of the fact that the communication was made with the consent of the presiding judge, whose discretion in cases of this kind is certainly entitled to some confidence, and in view of the state of the authorities on this point, it is believed that the rule laid down in the Washington court will not be followed in its strictness in other jurisdictions.

## BOOK REVIEWS.

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LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. Delivered before the Dwight Alumni Association by WILLIAM D. GUTHRIE. Boston: Little, Brown & Co. 1898.

Mr. Guthrie's lectures furnish most entertaining reading and at the same time display great thoroughness of learning. Especially noteworthy is the author's minute familiarity with all the recent cases. His views are "views of the day" in an exaggerated degree; he expresses in the most pronounced form the present increasing tendency to shoulder upon the Federal courts responsibility for everything. He wants further extension of the "constitutional guaranties" to protect foreign corporations from state invasion of their "property rights" and of what he thinks should be their "privileges and immunities" (see p. 55). He wants to construe the first eight amendments as incorporated into the restrictions on state action by virtue of this "magna charta," as he calls the Fourteenth Amendment, and thinks the courts will eventually alter their position and make such a construction (p. 58, *et seq.*). The language of the Reconstruction Committee which reported the Amendment is quoted to support this interpretation, and the contention is made that the "question has yet to be squarely decided by the Supreme Court in some case properly raising the point and fully presenting it in connection with the intention of the framers of the Fourteenth Amendment. To this intention . . . not the slightest reference has heretofore been made in any case . . ." (p. 64).

After reading this language it seems a little curious to go back to an earlier lecture and discover that "the Fourteenth Amendment was not adopted in order . . . to vest in the Supreme Court general supervision over the legislation of the states, with authority to nullify such as it did not approve. If this were not so, the Supreme Court would become the censor of practically all state statutes and the tribunal of appeal from all legislation regulating or affecting individual liberty or property rights" (p. 43). What less than this would result from a construction which embodies in the Fourteenth Amendment all the first eight amendments, and gives foreign corporations the "privileges and immunities" of citizens? We have a condition of affairs even now too nearly approaching that described. Mr. Guthrie (p. 28) points out that the ten years since the appointment of Chief Justice Fuller, have been the period of the greatest activity of the Supreme Court and that this greatest activity is occasioned principally by cases under the Fourteenth Amendment. "More cases involving the Fourteenth Amendment

are now presented to the Supreme Court for adjudication than upon any other branch of jurisprudence" (p. 27). Our "due process" and "equal protection" cases already clog the wheels of justice. Laws and ordinances in every other country considered the appropriate exercise of administrative authority, are here attacked in District, Circuit, Supreme courts, and finally after litigation often lasting years are solemnly pronounced unconstitutional.

The five lectures are entitled as follows: I, Of the History of the Fourteenth Amendment (very interesting); II, The Principles of Construction and Interpretation; III, Of Due Process of Law; IV, Of the Equal Protection of the Laws; V, Of the Rules of Practice. There is added a well annotated copy of the Constitution, which has an index separate from that of the lectures.

R. W. W.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By E. PARMELEE PRENTICE and JOHN E. EGAN. Chicago: Callaghan & Company. 1898.

The Commerce Clause of the Constitution has become, by force of the increasing importance of the subject upon which it acts, most vitally interesting to all who desire that the constitution may be found equal to the enormous strain new occasions are ever calling upon it to endure.

Our authors have called attention to this clause as a "peace-maker." This it most undoubtedly has been, and, perhaps, the thought has a wider application than the writers intended. The throwing down of any barrier, be it industrial or otherwise, which divides the selfish interest of one set of men from those of another set, is usually equal to the formation of a bond of union. Our constitution in this, as in many other apparently minor points, has in itself the seeds of many a peaceful revolution, if it be but preserved until the slow processes of nature allow the harvest to succeed the seed time. The events of the past few years, however, may lead many to ask if, under certain interpretations, this same clause may not be rather the promotor of passions such as lead to violence and bloodshed rather than to the calm ways of peace. When the authority of the peace-maker is invoked to justify the utterance of such militant words as these, "If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws." *In re Debs*, 158 U. S. 582, the promise of peace seems silenced by these harsher sounds. Our authors, however, do not attempt to look far into the future, they give us what has been done, and give it in the usual mode. That is, they divide their subject into heads and sub-heads, and arrange the cases in orderly progression under these. Our judges should be flattered in these latter days of books composed of extracts from their decisions strung together with slender connecting threads by

the judicious hand of the author. Since they have said these things so well, why, indeed, should the author say them over again in his own way, which, in many cases, he may be justified in thinking will not be a better way? Certainly, if the author has not much to say, it is well he should say little, but the reader may sometimes feel that he has heard these judicial voices before; they were acquaintances of his early student life, and friends before he finished. But they were not always in accord, and they left problems which as yet he has not been able to solve. He looks at a new work such as this with hope for new light on these problems; he finds them stated, finds a clear and systematic setting forth of the law on the question; a book to which he can turn to settle a half forgotten point or confirm his remembrance of others; in many ways a most satisfactory book, and if he asks for more, he is probably ungrateful, for he is asking for what is denied him in the vast majority of the books upon the law which now come to him. And since the supply of others is so limited, he may well ask himself if the demand is not limited also, and if he is not of a minority too small to be of concern to the makers of books.

M. C. K.

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A COMPENDIUM OF INSANITY. By JOHN B. CHAPIN, M.D., L.L.D. Illustrated. Philadelphia: W. B. Saunders. 1898.

A book by so eminent an authority as Dr. Chapin is always deserving of careful attention, and when, as in this case, it supplies a professional want of long standing, viz., a compendium in a concise form, of the diseases of the mind, stripped as far as practicable of technical terms, it deserves conscientious appreciation. After stating that the abnormal conditions and manifestations usually embraced under the terms "insanity" and "idiocy," or occurring as complications of bodily disease, are better studied when aided by a knowledge of the operations of the mind in its normal condition, the author devotes an introductory chapter to the consideration of the operative faculties of the normal mind, which, for purposes of convenience, he divides into the *intellectual faculties, the emotions or feelings, and the will*, and the relation of the physical characteristics of individuals to mental peculiarities.

The treatise itself is comprehensive yet simple. A chapter on Idiocy and Imbecility, in which an accurate definition and description of each is given, and the distinction between them explained, is followed by one devoted to the definitions of insanity. After quoting several, he gives his commendation to the following: "Insanity is that mental condition characterized by a prolonged change in the usual manner of thinking, acting, and feeling—the result of disease or mental degeneration." Chapter III. defines and distinguishes the terms Delusion, Hallucination and Illusion, and then the author points out that, as these usurp the places of other ideas, they make new channels and operate upon individuals so as

to excite actions. This phase of the subject is treated in a chapter entitled Actions of the Insane. The classification and nomenclature of the various forms of Insanity—Mania, Melancholia, Periodic Insanity, Progressive Systematic Insanity, Dementia, Organic and Senile Dementia, General Paralysis, Insane Neurosis, Toxic Insanity, Moral and Impulsive Insanity, Idiocy—and a treatment of each of them, follows in logical order, together with valuable suggestions for treatment in each of these forms. Interesting, though brief, is a chapter on those Abnormal Psychical States brought about by traumatic or moral shocks, or obscure nervous diseases, which manifest themselves by a suspension of conscious cerebration, or of the function of some of the faculties of the mind, as the will and memory. The author points out that persons so affected cannot be classed as insane and cautions great care in fixing a degree of mental responsibility. The relation of Morbid Anatomy to Insanity, a chapter on Medical Certificates and Feigned Insanity, of great practical value, complete this treatise. The author gives a concise account of the various steps in the proceedings for the detention and treatment of the insane in hospitals, and emphasizes the responsibility of the physician in this important inquiry.

Even a cursory reading of this work impresses one with the author's complete grasp of his subject, and we have no hesitation in prophesying a complete fulfillment of the hope expressed in the preface that "it will prove helpful to members of the legal profession, and to others who, in their relations to the insane, and to those supposed to be insane, of the desire to acquire some practical knowledge of insanity, presented in a form that may be understood by the non-professional reader."

*J. A. McK.*



## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**PRINCIPLES OF CONSTITUTIONAL LAW.** By THOMAS M. COOLEY.  
Boston: Little, Brown & Co. 1898.

**A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE.** By JAMES  
BRADLEY THAYER, LL.D. Boston: Little, Brown & Co. 1898.

**BOUVIER'S LAW DICTIONARY.** Revised by FRANCES RAWLE, ESQ.  
Vol. II. Boston: Boston Book Co. 1898.

**THE LAW OF BUILDING AND LOAN ASSOCIATIONS.** By WILLIAM W.  
THORTON and FRANK H. BLACKLEDGE. Albany: Matthew Bender  
& Co. 1898.

**THE LAW OF BANKRUPTCY.** By EDWIN C. BRANDENBURG. Chicago:  
Callaghan & Co. 1898.

**THE LAW OF TRADE AND LABOR COMBINATIONS.** By FREDERICK H.  
COOKE. Chicago: Callaghan & Co. 1898.

**POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE.**  
Edited by JOHN CUTLER. London: Butterworth & Co. 1898.

**A TREATISE ON THE LAW OF CONTRACTS OF PLEDGE.** By HENRY  
DENIS. New Orleans: Hansell & Bro. 1898.

**PRACTICE IN ATTACHMENT AND GARNISHMENT OF PROPERTY IN THE  
STATE OF OHIO.** By JAMES M. KERR. Norwalk, Ohio: The  
Laning Printing Co. 1898.

**A TRUSTEE'S HANDBOOK.** By AUGUST P. LORING. Boston: Little  
Brown & Co. 1898.

**STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND.** Twelfth Edi-  
tion. London: Butterworth & Co.

**THE LAW OF DEBTOR AND CREDITOR.** By RUFUS WAPLES. Chicago:  
T. H. Flood & Co. 1898.

**EXPERIENCE IN THE UNITED STATES SUPREME COURT.** By A. H.  
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**THE ELEMENTS OF MERCANTILE LAW.** By T. M. STEVENS. London : Butterworth & Co.

**THE BANKRUPTCY LAW OF THE UNITED STATES.** By THEODOR AUB. Brooklyn : Eagle Book Co. 1899.

**ARCHBOLD'S PRACTICE IN THE COURT OF QUARTER SESSIONS.** By SIR G. SHERSTON BAKER. London : Shaw & Sons. 1898.

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**A GUIDE TO THE LAW OF LICENSING.** By B. STEPHEN FOSTER. London : Waterlow & Sons. 1898.

**THE LAW AND PRACTICE RELATING TO WORKMAN'S COMPENSATION AND EMPLOYER'S LIABILITY.** London : Waterlow & Sons. 1898.

**LAW AND PRACTICE UNDER THE PATENTS, DESIGNS AND TRADE MARK ACTS, 1883-88.** By WILLIAM NORTON LAWSON. London : Butterworth & Co. 1898.

**THE LAW OF MINES, QUARRIES AND MINERALS.** By ROBERT FORSTER MACSWINNEY. Second Edition. London : Sweet & Maxwell, Ltd. 1897.

**THE LAW OF AGRICULTURAL HOLDINGS.** By SYLVAIN MAYER. London : Waterlow & Sons. 1898.

**THE LAW OF EVIDENCE.** By SIDNEY L. PHIPSON. Second Edition. London : Stevens & Haynes. 1898.

**THE FACTORY ACTS.** By ALEXANDER REDGRAVE. London : Shaw & Sons. 1898.

**THE LAW OF NEGLIGENCE.** By THOMAS W. SAUNDERS. Second Edition ; revised by E. BLACKWOOD WRIGHT. London : Butterworth & Co. 1898.

**HISTORY OF THE LAW OF REAL PROPERTY.** By KENELM EDWARD DIGBY. Fifth Edition. Oxford Press, London and New York : Henry Frowde. 1897.

**STUDIES IN INTERNATIONAL LAW.** By THOMAS ERSKINE HOLLAND. Oxford Press, London and New York : Henry Frowde. 1898.

**THE FEDERAL COURTS.** By CHARLES H. SIMONTON. Richmond, Va. : B. F. Johnson Publishing Co. 1898.

\* **ELEMENTS OF MILITARY SCIENCE.** By JAMES S. PETT. New Haven : Tuttle, Morehouse & Taylor Press. 1895.

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## LIENS OF THE RECEIVERSHIP OF A BUSINESS CORPORATION.—PART I.

The scope of a receiver's powers, in the event of the insolvency of a business corporation, has been much discussed of late in the courts. We propose, in this article, to examine briefly some of the recent decisions touching the right of a receiver to continue a private business and incur expenses that shall be prior charges on the fund.

When a receiver is appointed for an insolvent corporation, the matter may affect the interests of (a) the owners; (b) the lien creditors, of various classes; (c) the unsecured or general creditors of the corporation; (d) the creditors of the receiver, and (e) the public. Manifestly the relative importance to be attached to these various interests will depend in part upon the theory of the receivership, and in part upon the nature of the business. It must be remembered that originally a receiver could be appointed at the suit of a creditor having an equitable lien<sup>1</sup> to collect the rents and profits of

<sup>1</sup> "The rule about receivers is very clear. A mortgagee who has the legal estate cannot have a receiver, for he has nothing to do but to take possession. An equitable mortgagee may, but he cannot if the first is in possession." Per Eldon, L. C. *Berney v. Sewell*, 1 J. & W. 627 (1820); *Gresley v. Adderley*, 1 Swanst. 573 (1818); *Howell v. Ripley*, 10 Paige, 43 (1843).

an estate for his benefit,<sup>1</sup> but without prejudice to superior liens;<sup>2</sup> then, if a superior lien of the same nature were not paid, the holder of it might have this receiver removed and his own appointed in the stead of the first.<sup>3</sup> In such a case, and under such a theory of the practice, the question here to be considered cannot well arise. Now, it is more customary to give notice to all parties and appoint a receiver to receive and preserve the property or fund in dispute *pendente lite*, and hold it impartially for the benefit of all parties, as their interests may appear.<sup>4</sup> These interests conflict in many cases: a lien creditor may wish an immediate sale that would sacrifice the owner's interests, or, again, the interests of the public may require the business to be continued and expense thereby incurred to the prejudice of the liens. This last condition is most often presented in the case of a railroad, since "a railroad is authorized to be constructed more for the public good to

<sup>1</sup> In the latter case Walworth, C., said, *inter alia*: "When a receiver is appointed in a suit, he is appointed for the benefit of such of the parties in that suit as, it shall afterwards appear, were entitled to the fund in controversy, but not for the benefit of strangers to the suit. If the receivership interferes with the right of a stranger, he may apply to the court to be heard *pro interesse suo*, and his rights will be protected against any inequitable interference by the officer of the court. But the appointment of a receiver does not give to a mere stranger to the suit the benefit of the proceedings in that cause, so as to authorize him to claim that which he would not have been entitled to if such a receiver had never been appointed."

<sup>2</sup> *Berney v. Sewell*, 1 J. & W. 627 (1820), *supra*. See also the forms in Seton on Decrees: *Decree Appointing Receiver of Estate in Mortgage*. "Let a proper person be appointed, etc., *without prejudice to the rights of any mortgagee or mortgagees* of the said estates, or any or either of them, [or but the appointment of such receiver is *not to affect any prior incumbrancers* upon the said estates who may think proper to take possession of the said estates by virtue of their respective securities."] Seton on Decrees, 219. *Decree Appointing Receiver on Application of Judgment Creditors*. "Let a proper person be appointed to receive the rents and profits of the real estate, etc., *but without prejudice to the right of any prior incumbrancer*; and if any prior incumbrancer is in possession, then without prejudice to such possession, etc." *Ib.*, 220.

<sup>3</sup> See, in general, 3 Daniell's Chan. Prac., \*\* 1951-2; *Wiswall v. Sampson*, 14 How. 52 (1852), and the foregoing cases.

<sup>4</sup> 3 Daniell's Chan. Prac., \* 1949; High on Receivers, § 1; *Davis v. Gray*, 16 Wall. 218 (1872).

be subserved than for private gain . . . The public retain rights of vast consequence in the road and its appendages with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver, or other officer in whose charge it is placed, to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not suffer detriment by the non-user of the franchises."<sup>1</sup> From this need was developed what is known as the *Rule in Fosdick v. Schall*.

The Supreme Court of the United States had sustained, in *Wallace v. Loomis*,<sup>2</sup> an order appointing receivers of a railroad, with authority to raise funds for the repairs and operation of the road by the issue of certificates that should be prior in lien to the existing incumbrances. The opinion of the court was delivered by Bradley, J., who said, *inter alia*: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is the duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."

The basis of this practice was thus stated in *Fosdick v. Schall*:<sup>3</sup> "The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the

<sup>1</sup> *Barton v. Barbour*, 104 U. S. 126, 135 (1851).

<sup>2</sup> 97 U. S. 146 (1897).

<sup>3</sup> 99 U. S. 235 (1878).

whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration, by the mortgage creditors, of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of the diversion."

As the court has already explained,<sup>1</sup> "the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. . . . The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that, while favoring one, injustice is not done to another."

This decision was soon afterwards re-stated in *Burnham v. Bowen*,<sup>2</sup> as follows: "If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

It follows from this that, if the receiver is appointed at the instance of a judgment creditor, the material man has no relief of this character, because as to such a creditor there has been no diversion.<sup>3</sup>

<sup>1</sup> *Id.*, 252, 253.

<sup>2</sup> 111 U. S. 776 (1883).

<sup>3</sup> *Kneeland v. American Loan and Trust Co.*, 136 U. S. 90 (1889).

Since the rule was first enunciated, the question has been repeatedly before the Supreme Court of the United States in decisions we need not now discuss. The rule has gradually been enlarged to include necessary supplies purchased and wage claims incurred immediately before the receivership, the general expenses of the receivership itself, rentals of leased lines, and various other matters. Moreover, the basis of the rule is made also the need, both in the interests of the property and of the public, of continuing the railroad as a going concern. Properly to protect these claims, therefore, they are in many cases given a lien upon the *corpus* of the fund, as well as upon the income collected by the receiver.<sup>1</sup>

For a full discussion of this subject the reader is referred to High on Receivers, § 3946, *et seq.*, where many authorities are cited. What has been said here may serve to explain the efforts made to apply the same rule to ordinary business corporations.

The Supreme Court of the United States has not yet passed upon the matter, but thus alluded to it in *Wood v. Guarantee Trust Co.*:<sup>2</sup> "The doctrine of *Fosdick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

There have been, however, numerous cases in the inferior Federal courts and in the Supreme courts of the several states. To examine, first, those in the Federal courts, one of the earliest is *Seventh National Bank v. Shenandoah Iron Company*,<sup>3</sup> decided soon after *Burnham v. Bowen*.<sup>4</sup> Priority was claimed for supplies alleged to have been furnished an iron manufacturing company and for money advanced for wages, but such a company was held not to come within the equitable

<sup>1</sup> *Miltenberger v. Logansport Railway Co.*, 106 U. S. 286, 311 (1882), etc., etc.

<sup>2</sup> 128 U. S. 416 (1888).

<sup>3</sup> 35 Fed. 436 (1887).

<sup>4</sup> 111 U. S. 776 (1883).

principles that give the employes of a railroad company a prior lien on its current earnings for the payment of their wages. Paul, J., delivering the opinion, referred to the doctrine of *Fosdick v. Schall*, but held it applicable only to railroads, which led him to call the master's allowance of the claims "an innovation on the rights of the prior lienholders of a corporation" of this kind. The same claims were again before him in *Fidelity Ins., Tr. & S. D. Co. v. Shenandoah Iron Co.*,<sup>1</sup> when priority was claimed for receiver's certificates representing them. The earlier decision was affirmed, with the remark that "this doctrine has never been applied to mining or manufacturing companies. It is, owing to the quasi-public character of such companies, confined to railroad corporations."

The next case is *Farmers' Loan and Trust Company v. Grape Creek Coal Company*,<sup>2</sup> in which application was made for leave to borrow money on receiver's certificates to pay certain taxes, etc., and provide working capital for a coal company. This case is generally cited as the leading authority, and we quote at length from the opinion of Judge Gresham:

"When it becomes necessary for a court of chancery to take possession of property which is the subject of litigation, by placing it in the hands of a receiver, all expenses incident to its safe keeping and preservation are properly chargeable against it; and, if there be no income, such expenses will be paid out of the proceeds of the *corpus* before distribution to lien or other creditors. It does not follow, however, that because property of a private corporation or a natural person may be thus protected and preserved before sale, that, in order to raise money to operate it for profit, a court may place a charge upon it in advance of existing liens. Pending a suit to foreclose a mortgage executed by a railroad corporation, the road may be operated by a receiver, and debts contracted for labor, supplies and other necessary purposes before, as well as after, the appointment of a receiver, may be made a first lien upon income, and, if that is not adequate, upon the *corpus* of

<sup>1</sup> 42 Fed. 377 (1889).

<sup>2</sup> 50 Fed. 481 (1892).



the property. In the exercise of this exceptional and extraordinary jurisdiction, which is of comparatively recent origin, courts have entered orders making receiver's certificates first liens on the mortgaged property. This has been done, however, on grounds not applicable to mortgages executed by private corporations. A railroad corporation is a *quasi*-public institution, charged with the duty of operating its road as a public highway. . . . Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. . . . The court is not asked to subvert the lien of the mortgage on the ground that the trustee or bondholders have got possession of anything which, in equity, belongs to general creditors. It is to enable him to operate the mines for the benefit of bondholders, against the wish of part of them, that the receiver desires to be invested with authority to issue certificates which shall be a prior lien upon the property embraced in the trust deed. Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages (sometimes with unwarranted freedom), on account of their peculiar nature, to all mortgages. The power does not exist, and the application is denied."

Judge Paul had the question before him again for consideration a year later in *Fidelity Ins., Tr. & S. D. Co. v. Roanoke Iron Company*,<sup>1</sup> and his opinion contains a very satisfactory statement of the law. Proceedings in foreclosure were instituted by the mortgage trustee and the receiver appointed by the court filed a petition praying leave to issue receiver's certificates. It was desired to give these a paramount lien, to obtain funds to carry on the manufacture of iron. This application was opposed by various bondholders and supply lien creditors. The question of the court's right to authorize such

<sup>1</sup> 68 Fed. 623 (1895).

an issue had not been ruled by the Circuit Court in that district, and the number of manufacturing corporations in like case within the district led Judge Paul to consider it very attentively. He refers to the *Rule in Fosdick v. Schall*, by this time thoroughly established, and notices the cautions given by the courts in applying it. Thus, Chief Justice Waite, who had enunciated the rule, said, in *Shaw v. Railroad Company*,<sup>1</sup> that the courts should not allow money thus to be borrowed by mortgagees to complete an unfinished road except under extraordinary circumstances—rather, the enterprise should be reorganized by converting the bonds into stock and creating a new mortgage, or by some equivalent scheme which would place the matter in the hands of those immediately interested. Judge Paul proceeds:

“ The principle on which the doctrine rests is that railroad companies are considered public corporations which are not controlled and managed alone for the personal benefit of the individual stockholders . . . A railroad is created by the will of all the people of the state, as expressed through their representatives, and it exercises its powers and franchises only by their permission . . . It would be a serious calamity to the people of any section of the country to allow a railroad of any importance, constructed for their benefit, to be stopped in its operations for lack of means to keep it alive and pay its running expenses. We cannot deduce from these reasons, for exercising this extraordinary power of a court of equity in dealing with the interests of a railroad company, any authority for the court to deal in the same way with a private corporation. The latter is created solely with reference to the pecuniary advantage of the individuals who take part in its creation and enjoy the benefits to accrue from the profits arising out of its operations. The public has no interest in its existence or continuance other than what may accrue to the people of the particular locality in which a mill, factory or furnace may be established. This is too vague and indefinite to be the subject of the care and protection of a court of equity.”

But when Judge Paul laid down the rule in broad terms

<sup>1</sup> 100 U. S. 612 (1879).

that, *without the assent of all the lien creditors*, the court has no power to authorize the receiver of an insolvent business corporation to issue certificates with paramount lien for the purpose of carrying on the business, he was, nevertheless, careful to add the *proviso*, "unless it be necessary to do so in order to preserve the existence of the corporate property and its franchises." The question of preserving the franchises, be it noted, had not yet arisen.

The right recognized in *Fosdick v. Schall* and the following cases of claiming priority for supplies furnished immediately before the receivership was invoked in *Snively v. Loomis Coal Company*.<sup>1</sup> A vendor's lien was foreclosed and the receiver appointed in the proceedings was directed to continue to operate the company's mines and transact its mercantile business. This case, like the earlier one of *Laughlin v. U. S. Rolling Stock Company*,<sup>2</sup> raises the question indirectly, since a claim for supplies furnished a railroad corporation is given its lien to procure the continued operation of the road as a going concern. This reason, the court held, does not apply to a private corporation; the public has no special interest in it, and it may well be closed down during the foreclosure proceedings. Again the assertion is made that contracts of the parties must be free from interference by the courts, and not be impaired by the preference of simple contract claims.

A Circuit Court of Appeals considered the question, for the first time, in *Hanna v. State Trust Company*.<sup>3</sup> A land and irrigation company became insolvent, the second mortgagee instituted foreclosure proceedings and a receiver was appointed; authority was sought, against the objection of the first mortgagee, for the issuance of certificates with a paramount lien to pay taxes and raise funds to continue the irrigation business and improve the company's lands. It appeared that the company had sold much land on credit and the fruit trees planted by the purchasers would die unless irrigated. The master reported, furthermore, it was "of vital

<sup>1</sup> 69 Fed. 204 (1895).

<sup>2</sup> 64 Fed. 25 (1894).

<sup>3</sup> 70 Fed. 2 (1895).

importance to the company" that the amounts due on the executory contracts be collected, which could not be done unless the business were continued, and that the purchasers had a right, in justice and equity, to demand the performance of the contracts. It will be observed an effort was made to assimilate the case to that of a railroad operated for the public good. An order was entered accordingly and the first mortgagees appealed.

The opinion of the Circuit Court of Appeals is exhaustive. Caldwell, Cir. J., refers to the authorities relating to railroads and to those just examined in the United States Circuit and District Courts, involving private corporations, but relies chiefly on *Raht v. Attrill*,<sup>1</sup> a case to be considered presently. The opinion of Judge Caldwell deals so clearly with the whole question that we quote from it at length :

"The amended bill would seem to be founded on the theory that a private corporation conducting any kind of business may, when it becomes insolvent, obtain immunity from the compulsory payment of its debts by procuring a junior mortgagee, or some other creditor, to file a bill alleging the insolvency of the corporation, and praying for the appointment of a receiver with authority to manage and conduct its business. Upon the filing of such a bill, it is supposed to be competent for the court, in addition to appointing a receiver to carry on the business of the corporation, to enjoin its creditors, including the holders of the prior liens on its property, from collecting their debts by due course of law, and to continue such injunction in force so long as the court, in its discretion, sees fit to carry on the business of the insolvent corporation. When a receiver is appointed under such a bill, he usually makes haste, as the receiver did in this case, to assure the court that, if he only had some capital to start on, he could greatly benefit the estate by carrying on the business that bankrupted the corporation. In this case, the company being insolvent and its property mortgaged for more than it was worth, there was no way of raising money to set the receiver up in business, except by the court giving

<sup>1</sup> 106 N. Y, 423 (1887).

its obligations, in the form of receiver's certificates, and making them a paramount lien on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation and the junior mortgagee united in urging the court to arm its receiver with the desired powers. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security; so that it had nothing to lose, and everything to gain, in experiments to enhance the value of the mortgaged property, so long as the cost of those experiments was made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. The representation is always made, in such cases, that the receiver can carry on the business much more successfully than was done by the insolvent corporation. This commonly proves to be an error. But, if it were true, it would afford no ground of equitable jurisdiction, for it is not a function of a court of equity to carry on the business of private corporations, whether solvent or insolvent. It is obvious that if the holders of the first mortgages and the other creditors of the insolvent corporation were allowed to proceed, in the customary and lawful mode, to collect their debts, it would put an end to the business of the receiver, and they are therefore enjoined from foreclosing their mortgages or collecting their debts. The chancery court thus assumes, in effect, all the powers and jurisdiction of a court of bankruptcy or insolvency, but without any bankrupt or insolvent law to guide or direct it in the administration of the estate. Its only guide is that varying and unknown quantity called 'judicial discretion.' The powers claimed for a court of equity in such cases are, indeed, much greater than a court of bankruptcy can exercise. There never was a bankrupt court, under any bankrupt act, authorized, at its discretion, to displace or nullify valid liens on the bankrupt's property, or itself to create liens paramount

thereto. . . . If junior lien creditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a sawmill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court, and those courts would soon be conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporations at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value. It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person. . . .

Taxes are the first and paramount lien on all property, and must be paid. When taxes are due on property in the hands of a receiver, and he has no funds to pay them, the court will authorize him to borrow money for that purpose and make the obligation given for the money so borrowed a prior lien on the property on which the taxes were due. This is not fixing a new or additional lien on the property, or displacing any prior lien. It is simply changing the form of the lien from one for taxes to one for money borrowed to pay the taxes."

The Circuit Court of Appeals for the Fifth Circuit took a much less rigorous view of its duty in another case involving a corporation whose operations affected the public.<sup>1</sup> There was, to be sure, the difference that in one the receiver was appointed in foreclosure proceedings, and in the other because

<sup>1</sup> *General Electric Co. v. Whitney*, 74 Fed. 664 (1896).

of allegations of insolvency and mismanagement. The defendant had a profitable contract to light the city of New Orleans, and another contract under which the receipts from the first were assigned. The receiver was, therefore, permitted to perform one and repudiate the other, thus in effect protecting the holders of liens on the corporation's property at the expense of other creditors holding liens on the corporation's income. The court well said: "It cannot be contended that the court should be required to operate the property without funds to meet its necessary running expenses, for the physical impossibility involved is the patent answer to such a contention." Yet is not the course adopted by the court quite as unreasonable, even if more feasible?

The later Federal cases call for no extended notice. In *Newton v. Eagle & Phoenix Mfg. Co.*,<sup>1</sup> the corporation prayed the court to require the receivers (who were apparently appointed by reason of the corporation's insolvency) to pay the maturing mortgage interest, and thereby prevent a default that would have entitled the trustee to proceed to enforce the trust deed. This could be accomplished only by an issue of receiver's certificates, with lien prior to the bonds whose interest would thus have been paid, and prior also to other preferred claims. The court properly enough refused to sanction such an illusory payment as this, resting the decision on the opinion of Judge Gresham, in *Farmers' Loan and Trust Co. v. Grape Creek Coal Co.*<sup>2</sup>

In *Doe v. Northwestern Coal and Transportation Co.*<sup>3</sup> the general rule is reiterated and enforced as to lien holders who had not consented to the issue of receiver's certificates, but those who had consented were postponed to them.

From this review of the authorities it appears that the Supreme Court of the United States has not yet been called upon to consider how far the *Rule in Fosdick v. Schall* is applicable to a private corporation. The court has suggested, however, that the rule may not apply, and it has assigned to the rule,

<sup>1</sup> 76 Fed. 418 (1896).

<sup>2</sup> 50 Fed. 481 (1892).

<sup>3</sup> 78 Fed. 62 (1896).



especially in the later decisions, a basis inconsistent with the nature and duties of a private corporation.

The Circuit Courts of Appeal have decided the question directly only once. The right to borrow money to pay taxes was conceded, but the power of the court to charge an estate with liens to secure the continued operation of a business conducted for private profit, important though that business might be to the corporation's customers, was denied in the strongest terms. In this instance the business was the furnishing of water for irrigation, a business vitally affecting the prosperity of the farmers and fruit growers in the arid sections of the West, and one that may well some day be classed among those to be conducted by the state.

The only other case before a Circuit Court of Appeals involved the furnishing of light to a city—another semi-public enterprise. Here the court aided the receiver by restoring to him current income diverted and assigned by the corporation to obtain funds for immediate use. Without this additional revenue the receiver could not have met his current expenses, but the assignee had a good title and the contract producing the revenue was beneficial to the receiver; we submit, therefore, that enjoining the city from making payment to the assignee was tantamount to divesting liens, as is done in dealing with railroads. The action is justified on general grounds, yet the nature of the business may have influenced the decision.

The Circuit and District Courts have dealt with applications for leave to issue receiver's certificates in cases of corporations engaged in coal mining and in iron and general manufacturing. The purpose of the applications was to secure working capital and to give preference to claims for wages earned and supplies furnished immediately before the receivership. These courts have uniformly disclaimed such power as an invasion of vested rights. On the other hand, when the claim to be paid had the paramount lien in any event, like taxes, and immediate payment was desirable, the certificates were authorized. Of course, when those whose interest would be affected gave their consent, the question could not arise.

In general, therefore, we may regard the rule as well settled

in the Federal courts. It will be interesting, nevertheless, to see what will be done, should the case arise of a corporation having by statute the monopoly of operating a ferry or of supplying a city with light or water.

*Erskine Hazard Dickson.*

(To be continued.)

## GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART III.

### II.—*The Right to Interfere.\**

#### 2. Public Subject Matter of Contract.

##### (b.) Contract of Public Service.

Transportation is the typical example of a public calling. The common law compelled those carriers "holding themselves out for hire to carry the goods of all persons indifferently," to substantiate this "holding out" and to accept the goods of any who offered. The charges of the carriers thus "common," in the legal sense, were a matter of judicial concern and *by law must be reasonable*. The argument which would confine the *right* to interfere to cases involving contracts of public service brings here a *post ergo propter*, and asserts that the regulation of the rates follows, because the public has a right to demand the service. But why, pray, has the public a "right to demand the service?"

Mr. Albert Stickney, in his book on "State Control of Commerce and Trade," makes a division of occupations into what he calls "public employments" and "private employments." The former including light, water, telegraph and telephone service, also that of grain elevators and stockyards,<sup>1</sup> in addition to the business of transportation, are legitimately the subjects of state control. The latter, which it is asserted are clearly distinct from those in which the service is essentially public, are among the rights of life, liberty and property guaranteed by the Fourteenth Amendment, and cannot be touched by the legislature. "As to private employments the growth of the law has been continuous to its present condition of virtually complete non-interference. As to common carriers, on the other hand, the state control is practically unrestricted, and is ample for the protection of all rights of the citizen. The growth in the one branch of the law has been from a

\* Continued from March number.

<sup>1</sup> As to stockyards, see *Cotting v. Stockyards Co.*, 79 Fed. 679 (1897).

condition of minute and annoying restriction to one of complete freedom. In the other, it has been from a condition of comparative freedom to one of complete and adequate supervision and control."<sup>1</sup>

In like manner, Mr. Justice Field says that it is not "within the competency of a state to fix the compensation which an individual may receive for the use of his own property, in his private business, and for his services in connection with it."<sup>2</sup>

From these words might be inferred a positive, determinable, and essential difference in kind between "public" and "private" occupations. An examination of the famous grain elevator cases may help us to an opinion as to the validity of the attempted distinction. *Munn v. Illinois*<sup>3</sup> was a case involving the constitutionality of a statute of Illinois which declared grain elevators to be public warehouses and prescribed the rates of storage. The opinion of the majority affirming the validity of the act declares (p. 131), "that, although, in 1874, there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them; and (that) the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the West' must pass on the way 'to four or five of the states on the sea shore' *may* be a 'virtual' monopoly.

"Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the inn-

<sup>1</sup> Page 88 of "Commerce and Trade." Mr. Stickney passes over the regulation of interest with the simple assertion that the reasons for that are historical. With submission, the opinion may be ventured that the reasons for the other sorts of regulation are also "historical."

<sup>2</sup> Dissenting opinion of Field, J., in *Munn v. Illinois*, 94 U. S. 113, 138 (1876).

<sup>3</sup> *Supra*.

keeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz.: that he . . . take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. *It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.*" (Last italics mine.)

It was supposed that this case was practically overruled by the Minnesota cases,<sup>1</sup> but later in *Budd v. New York*,<sup>2</sup> *Munn v. Illinois* was reaffirmed and emphasized. The majority opinion approved the language of the Court of Appeals of New York, from which the case had been brought to the Supreme Court, to the effect that the right of the legislature "to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the state and country *and the practical monopoly enjoyed by those engaged in it*" (italics mine).

Mr. Justice Blatchford, delivering the opinion of the court, said: "It is contended . . . that the business of the relators in handling grain was wholly private and not subject to regulation by law; and that they had received from the state no charter, no privileges, and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any

<sup>1</sup> 134 U. S.

<sup>2</sup> 143 U. S. 517 (1891).

other individual in the community. But these same facts existed in *Munn v. Illinois*. In that case, the parties offending were private individuals doing a *private business*, without any privilege or monopoly granted to them by the state. Not only is the business of elevating grain affected with a public interest, but the records show that it is an *actual monopoly*, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character. The act is also constitutional as an exercise of the police power of the state."<sup>1</sup>

In *Brass v. Stoesser*,<sup>2</sup> Mr. Justice Brewer dissents "because the facts show . . . *no practical monopoly* to which a citizen is compelled to resort, and by means of which a tribute can be exacted from the community." The learned justice, desiring earnestly to find some barrier which can be placed by the courts in the way of "legislative assaults" upon property, having failed to establish the one of "legal monopoly,"<sup>3</sup> now takes his stand behind the "virtual monopoly" limitation apparently set up by the decisions in *Munn v. Illinois* and *Budd v. New York*. But the majority (a narrow one of five to four) refuse to admit that theory as the determining factor in those cases:<sup>4</sup> "Again, it is said, that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in transshipping grain from the lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural state, where land is cheap in price and limitless in quantity, are thought to be widely different and to demand different regulations.

<sup>1</sup> It would be interesting to know just what this last sentence means.

<sup>2</sup> 153 U. S. 391, 409 (1894).

<sup>3</sup> See his dissenting opinion in *Budd v. New York*, *supra*.

<sup>4</sup> *Brass v. Stoesser*, *supra*, at p. 403.

" These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed *are matters for those who make, not for those who interpret the laws.* (Italics mine.) When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, *whether carried on by individuals or associations* (my italics), in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and under other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered at some length into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. *Such efforts, on the part of judges, to justify to citizens the ways of legislatures, are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law; and thus the real question at issue—namely, the power of the legislature to act at all—is obscured*" (italics mine). These views of the majority are quoted at length because of the evident tendency of the court to disregard any distinction between "public" and "private" employments, so far as regards the *right* of the legislature to interfere. With the policy of such interference the court rightly say they have nothing to do.

There seems little doubt of the correctness of this position of the Supreme Court. The words public and private are incapable of exact definition. When Mr. Justice Brewer asks, "If it (the government) may regulate the price of one service, which is not a public service, or the compensation for the use



of one kind of property which is not devoted to a public use, why may it not, with equal reason, regulate the price of all service and the compensation to be paid for the use of all property?"<sup>1</sup> he, of course, perpetrates a *petitio principii* in his condition. What would constitute a "dedication to public use" in one state of society, would not in another. The terms are all relative, and cannot be delimited with certainty. The statement so often made, in varying forms, that a "public use is very different from a public interest in the use," since "there is scarcely any property in whose use the public has no interest,"<sup>2</sup> asserts a difference only of degree.

### 3. Effect on Public Interests.

The "public interest," at the last analysis, is what makes the public character of the service. The exercise of the right of eminent domain is not the foundation of such character. The gift of that prerogative is the result of a common cause. Carriers were regulated when they were only wagoners and boatmen. Public franchise and eminent domain came later, as a means of exercising government control or of assisting a business in which the people at large were concerned. Also, as we have seen, the artificial personality of a corporation is of itself no reason for state interference with its business, nor is the legal grant of a special privilege. See how the simple "public interest" explanation clears up the vexed question of "legal" and "virtual" monopolies. It is doubtful whether, historically, there has ever been a class of "legal monopolies" which did not arise from a prior partial or complete monopoly of fact. Monopolies in commodities must have been enjoyed before governments were organized. An individual monopoly in salt, for instance, in savage times, would cause

<sup>1</sup> *Budd v. New York*, 143 U. S. 517, dissenting opinion, at p. 551 (1892). "Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the taxpayer. The same may be said of every power where there is an exercise of judgment." McLean, J., in *Piqua Bank v. Knoop*, 16 How. 369, 383 (1853).

<sup>2</sup> Mr. Justice Brewer's dissent in *Budd v. New York*, *supra*, at p. 549.

coercion of numbers—a “government regulation.” A tribal monopoly would give rise (as a matter of fact has been the case) to intertribal wars, and, when the tribe grew into a nation, to national supervision. The virtual monopoly helps make the public interest, and that, in turn, is the reason for creating the legal monopoly—the most radical and thorough form of government control.

To be sure, this line of reasoning, like that which controverts the old distinction between *mala prohibita* and *mala in se*, removes a certain appearance of clearness and distinct limitation presented by some of the theories discussed. It is true, as Mr. Justice Brewer said, that no one can tell when his business will become of sufficient importance to the public to be impressed with a “public interest.” “Public policy,” which Mr. Bonney thinks is synonymous with common sense, may to-day stamp a business as “public” which yesterday was considered “private.” That must be within the discretion of the legislature, and is or should be purely a matter of expediency, having regard to the average reached by a balancing of the good to be accomplished or the evil to be overcome by any particular piece of law-making, against the troubles and disadvantages incident to its enforcement. The “rights of man” should enter into the question only to furnish a very strong presumption against the *policy* of interference legislation, not at all against the enacting power.

The Supreme Court has recognized the force of considerations such as these, in three important cases: *Head v. Amoskeag Mfg. Co.*,<sup>1</sup> *Brass v. Stoeser*,<sup>2</sup> and *Holden v Hardy*; <sup>3</sup> and

<sup>1</sup> 113 U. S. 9 (1885). This case upheld a Massachusetts “Mill Act,” which gave certain manufacturing companies a right to overflow the lands of others. The present decision, like that of *Murdock v. Stickney*, 8 Cush. 113 (1851), refuses to consider any theory of eminent domain as the basis of the statute. But many subsequent cases unite in considering such overflowing “a taking,” which requires a prerogative right. See Randolph on Eminent Domain, pp. 387, 388; Lewis on Eminent Domain. §§ 182-3. The curious circle in which the reasoner is landed, by attempting to justify one prerogative of the state by another, is well illustrated in this matter of eminent domain. In the transportation cases the exercise by the railroads of the right referred to is adduced to furnish a reason for state control of rates. On the other hand, in the

in many other instances the view here contended for has been tacitly acknowledged. The American protective tariff system employs the greatest and most characteristic prerogative of government—that of taxation—to build up private business enterprises, because of the interest the public are supposed to have in manufactures. The other prerogative of eminent domain has been granted in aid of mills and factories, drainage (for commercial purposes), mining and lumbering.\* And the “third prerogative,” of the “police power” (which is generally used to embrace everything not covered by the first two, and sometimes to include them), has been used in regulation of so-called private affairs too numerous to mention. The widest difference of opinion may exist as to the wisdom of any given exercise of this prerogative, but much would be gained if questions of *power* should be left out of account. But if the legislature *can* do these things, why *may* it not? And then what of Bellamy, State Socialism, the “coming slavery?”

This suggestion of Mr. Justice Brewer, that it is only the courts that stand between our present society and a socialistic reorganization of it, is very interesting as showing the judicial estimate of the legislatures. The learned justice evidently considers that powers such as some of those reposed in the British Parliament would, if exercised by our own legislatures, “shake society to its foundation and destroy our civilization,” as Messrs. Guthrie and Harrison said *arguendo* in the Illinois Inheritance Tax Case.† The real doubt behind all this is doubt of popular government. Too many people have sat at ease, despising the legislative authority, and relying on the courts for protection from it under the guarantees of the Constitution. Mill cases, the grant of the eminent domain is frequently justified *by the previous state regulation of the charges!* See Lewis on Eminent Domain, § 178, *et seq.*

\* *Supra.*

† 169 U. S. 366 (1898). This decided the business of mining to be subject to such a “public interest” as to justify state control of hours of labor therein.

\* See Lewis's Em. Dom., chapter on “What is a Public Use,” § 157, *et seq.*

† 170 U. S. 283 (1898).

tion. They seem to forget that the ultimate authority, rising superior to all constitutions, is the will of the people. If that directs, constitutions will be changed. It may not always be that the despised "Populists" will be confined to the legislatures, with conservative intelligence in the courts nullifying all their attempts to right what they believe to be wrongs. The final battle, after all, must be fought at the polls. The feeling with which the so-called "masses" regard the courts is well illustrated by the language attributed to a labor leader recently in this city. He said: "If the life to come should be like this life—if there should be trusts and corporations there—they would tear up all the avenues leading to the Throne, take the gold from the streets of the New Jerusalem to make a corruption fund, and, if God said 'Thou shalt not steal,' would immediately have it declared unconstitutional." Observe the expression "have it declared." That expresses the feeling exactly. The people who passed the laws are possessed with the idea that somehow they have been cheated out of them.

The Socialists, by whatever name called, are the outgrowth of conditions. If the conservative classes could learn that the only permanent guarantee of individual rights lies not in constitutions or in courts, but in the vigilance with which liberty must always be bought and maintained; if these classes should cease to occupy themselves merely in evading and attacking laws, and should make their influence felt upon legislation itself, then we should have the security enjoyed by our British cousins, who get along very well under maximum freight rate laws and graduated income and inheritance taxes, which are enforced without judicial question as to their reasonableness.

To the first inquiry, "Has a government the right to interfere in the contracts of its subjects?" no answer seems possible but "Yes!" All attempts to segregate common carriers and other occupations historically subject to state regulation, appear failures. The carrier is no more or less rightfully under government control than others, except in so far as he is more or less the object of the public interest. What gives the public that interest? No definite criterion can be laid

down. It is, or should be, a legislative and not a judicial question. Three of the reasons usually put forward were given in the preliminary diagram :

- (a) Interference with Trade (including "Oppression of Third Persons"), or
- (b) Creation of Monopoly, or
- (c) Rise of Prices.

All of these may apply to carriers, but the last particularly. As Interstate Commerce Commissioner Knapp says,<sup>1</sup> "the thing the public is interested in, after all, is how much they have got to pay." The elegance of this expression might be improved, but its truth seems to be unimpeachable.

### III.—*The Practicability of State Interference with Transportation Contracts.*

#### (a.) Early Legislation.

Carriers by common law were required to serve the public without discrimination and for a "reasonable compensation." The first specific legislation to enforce this seems to be 3 William and Mary, c. 12 (1691):<sup>2</sup> "*And whereas drivers, wago-ners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade ; be it therefore enacted . . . that the justices of the peace of every county and other place within the realm of *England*, or dominion of *Wales*, shall have power and authority, and are hereby enjoined and required, at their next respective quarter or general sessions after *Easter* day yearly, to assess and rate the prices of all land carriage of goods whatsoever, to be brought into any place or places within their respective jurisdictions, by any common wagoner or carrier, and the rates and assessments so made, to certify to the several mayors and other chief officers of each respective market town within the limits and jurisdictions of such justices of the peace, to be hung up in some publick place in every such market town, to which all persons*

<sup>1</sup> Report Sixth Annual Convention of Railroad Commissioners, May, 1894, p. 24.

<sup>2</sup> 9 Stats. at Large, 154. Amended 21 Geo. II, c. 28 (1748).

may resort for their information; and that no such common wagoner or carrier shall take for carriage of such goods and merchandises above the rate and prices so set, upon pain to forfeit for every such offence, the sum of five pounds, to be levied by distress and sale of his and their goods by warrant of any two justices of the peace where such wagoner or carrier shall reside, in manner aforesaid, to the use of the party grieved."

This was part of "*an act for the repairing and amending the highways and for settling the rates of carriage of goods*," and is found in Chitty's Index of English Statutes, under the title "Highways." It was repealed in 1867 (and not in 1827, as is erroneously stated in the opinion of Waite, C. J., in *Chicago, Etc., R. Co. v. Iowa*)<sup>1</sup> by the "Statute Law Revision Act,"<sup>2</sup> beginning: "Whereas . . . it is expedient that certain enactments . . . which may be regarded as spent, or have ceased to be in force otherwise than by express and specific repeal, or have, by lapse of time and change of circumstances, become unnecessary, should be expressly and specifically repealed," etc.

The Act 3 William and Mary, c. 12, was probably not in practical operation very long, if at all, in its application to carriage rates.<sup>3</sup> Waite, C. J., in the opinion above quoted, refers

<sup>1</sup> 94 U. S. 155, at p. 162 (1876).

<sup>2</sup> 30 & 31 Vic. c. 59 (1867), 107 Stat. at Large, 244, 250.

<sup>3</sup> Lord Kenyon said in ——— v. Jackson, 2 Peake's N. P. C., 185, 186 (1800), "There are acts of Parliament which authorized justices of the peace to fix the rates to be taken by carriers, and I have known instances of applications to the sessions for that purpose . . . ;" but no such instances have been recorded. Mr. Albert Stickney might just as easily draw his lesson from the failure of this law as from the failure of those of Edw. III and Eliz. He might just as easily conclude, regarding early English History only, that "all such legislation" has been "utterly useless," and that modern regulations of common carriers "are on the same line." (See first article of present series, December, 1898, number of this magazine, p. 730). On the contrary, he says (see State Control of Commerce and Trade, p. 8): "Such common carriers are virtually public servants, occupying and operating the people's highways. For every reason, therefore, it becomes necessary that they should be subject to state control." (Italics mine.) It should seem that the history of this law that failed," by Mr. Stickney's own arguments, is at least one reason

to this statute to prove *the power of regulation*, which, as he says, "is not lost by non-user." He seems to infer a power in the state legislature from that in Parliament, and says the fact that the statute lapsed through non-enforcement does not detract from the enacting power.

There appear to be no statutes in the United States fixing the compensation of common carriers prior to the era of railroad building. Then, however, numerous laws were passed, most of which provided, directly or indirectly, for official regulation of rates. One of the earliest statutes, and one that is typical of most of the laws passed at this time, is the New Hampshire Act of 1844, which says (Section 13) "*the rates of toll for freight of passengers and merchandise, when the net income of the stock shall exceed 10 per cent., shall be subject to alteration and revision by the legislature, according as they shall deem just and expedient.*" The Act of Vermont (Laws of 1849, No. 41) provided: "Every such corporation may establish, for their sole benefit, a toll upon all passengers and property conveyed or transported on their railroad, at such rates as may be determined by the directors of the corporation; and may from time to time regulate such conveyance and transportation, the weight of loads, and all other things in relation to the use of such road, as the directors shall determine. Provided, that the *Supreme Court* may, at any stated session holden in any county through which said road passes, on the application of ten freeholders of such county, and due notice thereof to the corporation, from time to time, as they shall deem expedient, alter or reduce such rates of toll, according to the provisions, if any, contained in the charters of such corporations; *but the said tolls shall not, without the consent of the corporation, be so reduced as to produce, with said profits, less than ten per centum per annum.* The laws of New York (Acts of 1850, Chapter 140) declared (Section 28) "but such com-

why carriers should not be "subject to state control." But Mr. Stickney has no reference to this statute in his book.

The Railway and Canal Traffic Act of 1888 (51 & 52 Vict., Chap 25) provides for the fixing of maximum freight rates by a "board of trade." But see *infra*.

pensation for any passenger and his ordinary baggage shall not exceed three cents per mile," and (Section 33) "the legislature may reduce or alter the rate of freight, fare, etc., on such railroads; *provided that the same shall not be reduced below a profit of ten per cent. per annum, upon the capital actually expended, without the consent of the corporation, nor unless it shall have been ascertained that the net annual income of the corporation exceeds ten per cent. per annum on the capital actually expended.*" The Ohio Act of February 11, 1848, Section 12, contained the provision that "at any time after the expiration of ten years, from the time any such road may be put in operation, it shall be lawful for the *General Assembly* to prescribe the rates to be charged for the transportation of persons or property upon said road, should they be deemed too high, and may exercise the same power ten years thereafter; *provided that no reduction shall be made unless the net profits of the company, on an average for the previous ten years, shall amount to ten per centum per annum upon its capital, and then so as not to reduce the future probable profits below the said per centum.*" Pennsylvania (Act of February 19, 1849, Section 18) and Michigan<sup>1</sup> (Act of February 12, 1855, Sections 17 and 35) adopted the policy of legislative regulation, but without any limitation as respects the profits.

These early statutes are given thus fully, because their phraseology suggests all the intricacies of the problems now confronting us. Most of these statutes, in addition to the language given, contain express declarations of the common law rule, that the rate of compensation "shall be" or "must be" no more than is "just and reasonable." The questions for decision then, as now, were:

- (1) What is a "reasonable rate?"
- (2) Granting there is such a thing as a "reasonable rate," and that it can be theoretically defined, what practical

<sup>1</sup> An amendment to this act was adopted March 15, 1861, providing "that railroads in the upper Peninsula, having less than fifty consecutive miles of road in actual operation, are excepted from its provisions and allowed to charge different rates." This was on account of the mountainous surface of the Northern Peninsula.



means can be found for determining just rates in particular cases?

(3) Granting the means of decision, who shall employ them? Whose determination shall be final? The legislature's, the railroad commissioners', the state courts', or the United States courts'? Or shall the jury determine the matter in each case as a question of fact?

(4) Does the rate in question "deprive any person of property without due process of law," or "deny to any person" within the state "the equal protection of the laws?"

The fourth question by the cases has been made practically synonymous with the second, and, to a certain extent, involves all the others; but it has been placed last because it comes last in point of time. The most elaborate attempts to define a reasonable rate, and to discover the means for determining that character, have been made in cases involving the application of the Fourteenth Amendment. Opposition to government regulation *per se* seems scarcely to have been thought of at the outset. Such opposition appears to have arisen largely in consequence of the difficulties encountered in the attempts to enforce the state's prerogative with fairness to all parties concerned.

The first careful consideration of this question by the Supreme Court of the United States was in the so-called "Granger Cases,"<sup>1</sup> decided in 1876. The first of these cases, *Munn v. Illinois*, involving the fixing of grain elevator charges, has already been specifically discussed under another head. Waite, C. J., delivering the opinion of the court in *R. v. Iowa*, said: "Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and . . . subject to legislative control as to their rates of fare and freight, unless protected by their charters." Mr. Justice Field says, in *Attorney-General v. Old Col-*

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, *Ib.* 155; *Peik v. R.*, *Ib.* 164; *Chicago, Etc., R. v. Ackley*, *Ib.* 179; *Winona, Etc., R. v. Blake*, *Ib.* 180; *Stone v. Wisconsin*, *Ib.* 181.

*ry R. Company*:<sup>1</sup> "Whatever difference of opinion there may have been among the justices of that court (the Supreme court) concerning the tests which determine whether property affected with a public interest, there is no doubt that the property of railroad corporations, which have been invested by the legislature with the right of eminent domain and are common carriers of persons or merchandise, is property 'devoted to a public use.' " . . . The justices of the Supreme court of the United States *perhaps differ in opinion whether there can be any judicial interference with the rates for railroad transportation established by the legislature of a state on the ground that they are not reasonable* (italics mine), but they agree . . . that the legislature may establish rates, or reasonable rates, unless there is an express provision in the charter which forbids it.

This statement, as to difference of opinion in the Supreme court, can no longer hold since March 7, 1898, when was decided the case of *Smyth v. Ames*,<sup>2</sup> commonly known as the Nebraska Freight Rate Case. I shall consider this case, with others previously decided, both in the United States and in England, in the next and last article of this series. The endeavor will be to find whether any new proposition of law was enunciated in this famous case, and to discover, if possible, the exact situation in which we are now left in the United States as regards the subject of the present discussion.

*Roy Wilson White.*

(To be continued.)

<sup>1</sup> 160 Mass. 62, 86 (1893)

<sup>2</sup> 169 U. S. 466.

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ADMIRALTY.

The rule that where supplies are ordered for a vessel by the charterer, the materialman is put on inquiry as to the charterer's authority to pledge the ship's credit, and will obtain no lien where he knows, actually or constructively, that the charterer has no such authority, is recognized in the recent case of *The Del Norte*, 90 Fed. 506. In that case, however, it was held that the materialman was relieved from the duty of inquiry by a statute of the state (Washington), which made "Masters, agents, consignees, contractors, sub-contractors, or other person or persons having charge in whole or in part of the construction, alteration, repair or equipment of any vessel . . . , the agent of the owner." As the materialman had no *actual* knowledge of the facts, he was allowed to recover, and the owner was said not to be injured by this result, as he had protected himself by a "Contract of Guaranty" with the charterer.

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#### ASSIGNMENTS FOR CREDITORS.

Following the dictum in *Chaffees v. Risk*, 24 Ga. 432, and the decision in *Vallance v. Trust Co.*, 42 Pa. 441, it was held in *Penn Plate Glass Co. v. Jones*, 42 Atl. (Pa.) 189, that an assignment by a debtor to a member of the creditor firm creditor firm, in trust, to pay the firm debt, was an assignment directly to the creditor which, under the Act of 1843 of Pennsylvania, does not have to be recorded.

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#### BANKRUPTCY.

*In re Bates Machine Co.*, 91 Fed. 625, involved the question of the right of the directors of a corporation to admit in writing its inability to pay its debts, as a basis of an involuntary petition. It was held that such an act was beyond the authority of the directors and, therefore, not binding on the company, the court intimating a doubt as to the parallel rule permitting the directors to make an assignment for the benefit of creditors.

## BANKRUPTCY (Continued).

Another question of first importance under the new act is whether the act of bankruptcy described under § 3 as "per-  
**Act of Bankruptcy** mitting while insolvent any creditor to obtain a preference through legal proceedings," requires any participation on the part of the debtor. Adams, D. J., *In re Reichman*, 91 Fed. 624, thought not. For an elaborate discussion of the question see Collier on Bankruptcy, notes to § 3.

*Bray v. Cobb*, 91 Fed. 102, decides a number of minor points under the new law: (1) That a referee is not disqualified under § 43 by being a debtor of the bankrupt, the  
**Construction of New Act** interest therein mentioned means an interest in the estate, and a debtor has none; (2) That an assignment for the benefit of creditors is an act of bankruptcy without regard to the debtor's assets at the time; (3) That a mere denial of insolvency in the answer does not sustain the burden of proof on the defendant and (4) that if defendant desires a jury trial he must claim it by the date fixed for his answer.

## CONSTITUTIONAL LAW.

In *Dewey v. Des Moines*, 19 Sup. Ct. 379, it was alleged that the amount of a special assessment on city lots was  
**Special Assessments, Personal Liability of Non-Resident Under State Statute, Due Process** "greater than the reasonable market value of said lots," and that defendants were seeking "to compel plaintiff to pay the full amount of said tax," without regard to the value of the lots. This allegation was considered not to raise a Federal question, because the point had not been called to the attention of the state court. But on a further question, which had been brought up in the state court, the opinion declares: "The state may provide for the sale of the property upon which the assessment is laid, but it cannot, under any guise or pretence, proceed further and impose a personal liability upon a non-resident to pay the assessment or any part of it." Such imposition is a "taking" of property "without due process," and so unconstitutional.

**Eminent Domain, "Front-foot" Assessment, In Excess of Benefit** This case calls to mind another recent instance of special assessment—*Norwood v. Baker*, 172 U. S. 269, S. C., 19 Sup. Ct. 187. (Notice how the unofficial reports have secured promptness in the issue of those bearing the official imprint. The case was decided December 12, 1898.) Here an assessment

## CONSTITUTIONAL LAW (Continued).

by the front foot was held a taking of private property for public use without compensation. Mr. Justice  
 Dissenting Opinion by Mr. Justice Brewer  
 Brewer's dissent, in which concurred Shiras and White, JJ., employs some language which seems rather remarkable, in view of the learned justice's distrust of legislatures, as expressed in the grain elevator cases. Says he (p. 297), "A public improvement having been made, it is, beyond question, a legislative function . . . to determine the area benefitted by such improvements, and *the legislative determination is conclusive.*" (Our italics.)

In *Gross v. Kentucky Board of Managers of World's Columbian Exposition*, the Court of Appeals of Kentucky, with two  
 Eleventh Amendment, Action of Contract Against a "State Board"  
 judges dissenting, have declared that the Kentucky Board of Managers for the Columbian Exposition of 1893, at Chicago, which was endowed with the power to make contracts by the act creating it, may be sued on any such contract. The dissenting judges contended that the members of the board were "agents of the state," and that it was the state's property alone which was to be affected by the suit. Accordingly, they considered the action as brought virtually against the State of Kentucky. The majority proceeded on the theory that the board, though not named a corporation, and apparently not intended as such by the legislature, really was a *quasi*-corporate entity, which could sue and be sued, citing Mr. Justice Brewer's opinion in *Hancock v. Railroad*, 145 U. S. 409, 12 Sup. Ct. 969 (1892).

The Court of Appeals of New York has decided that a statute (Laws 1889, c. 385) providing that every trade union  
 Unlawful Discrimination, Trade Labels  
 adopting a label to designate the products of the labor of its members may, by filing a copy of such label, obtain the right to enjoin the use, counterfeit or imitation of same, is not unconstitutional in discriminating in favor of members of unions as against non-union workmen: *Perkins v. Heert*, 53 N. E. 18.

## CONTRACTS.

In *Hall v. Alford*, 49 S. W. 444, the Court of Appeals of  
 Right of Stranger to Consideration to Sue  
 Kentucky reaffirms the rule that in that state a third person may sue on a contract made for his benefit between others, to the consideration of which he is a stranger.

## CONTRACTS (Continued).

In *Olds et al. v. East Tennessee Stone and Marble Co.* (Court of Chancery Appeals of Tenn.), 48 S. W. 333, the plaintiff wrote the defendant, a dealer in marble, asking if he could furnish a certain kind of marble at a certain price; defendant answered by telegraph "Will meet . . . price . . . Letter to-day's mail." The letter referred to, stated that the defendant did not care for the contract for the marble specified in the offer, and offered a different marble at a less price, which was refused. In an action on the contract alleged to have been consummated by the plaintiff's letter and the defendant's telegram, the court held, that the letter sent by defendant and referred to in his telegram must be considered, and, taken with the telegram, did not consummate a contract.

## CORPORATIONS.

*Forrester v. Boston, Etc., Mining Co.* (Supreme Court of Montana), 55 Pac. 229, recognizes the right of minority stockholders to restrain the directors of a solvent and prosperous corporation and the holders of a majority of its stock from transferring the corporate property to another corporation, in consideration of an exchange of stock or of a certain cash payment to stockholders unwilling to exchange. So far so good; but, on examination, it appears that the complainants purchased their stock pending the consummation of the transfer, and with notice of the nature of the proposed transaction. It should seem, under such circumstances, that they were without equity. Moreover, one complainant was the solicitor and the other the vice-president of a rival concern. It is true that the trial judge found that they were acting in "good faith;" but they seem to have been perilously near the position of the plaintiff, who was rebuked by Lord Wesbury, in *Forrest v. Ry. Co.*, 4 DeG. F. & J. 125, as distinguished from the facts of *Colman v. Eastern Co.'s Ry. Co.*, 10 Beav. 1, where Lord Langdale made a more lenient ruling.

## COUNTY BONDS.

In an opinion containing an exhaustive review of authorities, the Supreme Court of the United States, following *Chaffee County v. Potter*, 142 U. S. 355, decides that as against a *bona fide* purchaser of county bonds, a recital in the bonds that the total amount of the issue does not exceed the constitutional limit of indebtedness, taken in

COUNTY BONDS (Continued).

connection with the fact that the bonds do not show upon their face the amount of the issue, estops the county from disputing the truth of the recital: *Board of Commissioners of Gunnison County v. Rollins*, 19 Sup. Ct. 390.

CRIMINAL LAW.

What degree of proof is necessary in order to make out a defence of insanity was before the Supreme Court of Pennsylvania, in *Com. v. Wireback*, 42 Atl. 542. The defendant had shot and killed a man, and his defence was insanity. It was held, first, that a man is presumed to be sane until he is proved to be insane, and this can only be proved by fairly preponderating evidence. Doubt as to his sanity is not sufficient to overcome the presumption. Second, a murder, which is otherwise in the first degree, is not reduced to murder in the second degree by a doubt as to the sanity of the murderer, as insanity is either a complete defence or none at all.

The question as to whether a parent who refuses to provide a physician or medicine for a sick child is guilty of manslaughter, where the child dies as a consequence of such refusal, was before the English Court for Crown Cases Reserved, *Queen v. Senior*, [1899] 1 Q. B. 283. The parent belonged to a religious sect who did not believe in medical aid or drugs, but who anointed with oil and prayed for a recovery. A child of the defendant's was taken sick, and, although the illness was a grave one, and from which it afterwards died, he refused to call in a physician or secure medicine. Every other attention was paid to the child, and the defendant was a kind and loving father. The court decided that as a statute made it incumbent upon parents to provide such aid and made it a misdemeanor for those who "wilfully neglect" so to do, the father was guilty of the crime of manslaughter. The case is a valuable one on account of what falls from Lord Russell at the end of his opinion: "I wish to add that I dissent entirely from the view attributed to Piggott, B., in *Reg v. Hines*, and am not satisfied that in the present case there was not sufficient evidence at common law to justify a conviction." This shows a rational development in this branch of criminal jurisprudence, and is valuable in those states where no statutes exist on this subject. The view attributed to Piggott, B., was that in such a case as this there could be no conviction at common law. (See note in this issue.)



## EVIDENCE.

Two Texas cases, *M. K. & T. R. R. v. Johnson* (S. C. Tex.), 48 S. W. 568, and *G. H. & N. R. R. v. Davis* (S. C. Tex.),

**Res Inter** Dec. 22, 1898, 48 S. W. 570, indicate when, in  
**Allos Acta** negligence cases, acts of prior negligence on the part of the alleged delinquent may be admitted. In the former case evidence offered that the plaintiff had often slept on duty, to prove that on this occasion he had been asleep, was rejected, as the question of negligence was to be determined by the character of the act in question and not by the character for care and caution of the person performing the act.

In the second case, the competency or incompetency of the person whose act caused the injury, and his employer's knowledge thereof being in issue, the action being by one servant to recover for an injury caused by the negligence of another, evidence of prior acts of similar negligence was admitted, they being frequent enough to show an habitual course of careless conduct; but evidence that the delinquent was a drinking man, the rules positively forbidding drinking, was excluded in the absence of evidence that he was drunk at the time of the accident. Mere general bad habits in no way contributing to the accident can, of course, not be shown.

In *Hughes v. L. & N. R. R.*, 48 S. W. 671, an accident having occurred to a brakeman on the defendant's train, the

**Opinion,** statement made by the conductor at the time of  
**Res Gestæ** the occurrence as to the cause of the accident was excluded, it appearing that he had not seen the accident nor had any personal knowledge of its cause, his statement expressing merely his opinion thereof.

In *Pioneer Savings Bank v. Peck* (Ct. Civil Ap. Tex.), 49 S. W. 160, the court sustained the exclusion of evidence of the

**Conclusions of** witness' understanding of the law upon the sub-  
**Law** ject of the insolvency of loan and building associations, saying that it was for the court to decide the case upon its understanding of the law, and that they could dispense with the witness' generosity in stating his legal opinion on the subject.

## HUSBAND AND WIFE.

The Pennsylvania Act of May 4, 1855, P. L. 430, was the subject of discussion in *Seltzer's Estate*, 42 Atl. (Pa.) 289.

**Husband's** The court easily held that the purpose of that act  
**Rights In the** was to give the husband the same rights in his  
**Estate of his** wife's estate that she would have had in his if she  
**Deceased Wife** survived him; but that the question whether this



# HUSBAND AND WIFE (Continued).

proportion shall be one-third or one-half depends on whether the decedent left any children, and is not affected by the question whether the survivor has children or not.

In spite of the strong disposition of the courts to put the wife on the same footing as her husband, we still find occasional conservative decisions denying her equal privileges: such is *Morgan v. Martin*, 42 Atl. (Me.) 354, where the court sustained a demurrer to a declaration setting forth an alienation of a husband's affections.

*Parker v. Parker*, 42 Atl. (N. J.) 160, is a skilful treatment of an old subject. In New Jersey a wife is entitled to alimony if her husband has both abandoned and refused to support her. It was held that his cruel treatment of her, justifying a departure from his house, was equivalent to an abandonment by him, and that his altered attitude of reconciliation upon the filing of this bill for alimony, was no defence, being obviously insincere.

## MORTGAGES.

*West v. Williams*, [1899] 1 Ch. 132, is an important case. *Hopkinson v. Rolt*, 9 H. L. C. 514, has settled that a first mortgagee, whose mortgage is taken to cover also subsequent voluntary advances, cannot claim priority of second mortgage, of which he had notice before he made the advances. It was, perhaps, generally supposed, however, that if the first mortgagee had covenanted to make the subsequent advances, he would be protected as to them; and it was so held by Kekewich, J., in the lower court, [1898] 1 Ch. 488. His decision is, however, now reversed by the Court of Appeal, on the ground that the tacit agreement of every such mortgage is that the advances are to be made only if the security has not been impaired; and, if it has been impaired by a second mortgage, the first mortgagee should not make the additional advances.

## MUNICIPAL CORPORATIONS.

The constitutional provision that "The compensation of any city, county, town, or municipal officer, shall not be changed after his election or appointment, or during his Term of office," was held by the Court of Appeals of Kentucky to apply only to the salary of officers having a fixed term, and not to the salary of a

Officers,  
Law,  
Reduction of  
Compensation

## MUNICIPAL CORPORATIONS (Continued).

policeman who, under the statutes, was removable at pleasure, with or without cause. *City of Lexington v. Rennick*, 49 S. W. 787.

In *People ex. rel. Labaugh v. Board of Education*, 52 N. E. 850, the Supreme Court of Illinois declares that, where small-pox does not exist and there is no reasonable cause to apprehend its appearance, a rule adopted by the State Board of Health compelling the vaccination of children as a pre-requisite to attendance in the public schools, is unreasonable and void.

## NEGLIGENCE.

In *Aslen v. Village of Charlotte* (Supreme Court, App. Div.) 54 N. Y. Suppl. 754, which was an action against the municipality to recover for injuries received from a defective sidewalk, it appeared that the stringers holding the boards on the sidewalk were so badly decayed as not to securely hold nails driven into them through the planks. Witnesses for the plaintiff testified that for some time previous to the accident they had observed the defects in the walk, while defendant's witnesses, who had been over the walk, testified that they had not discovered its defective condition. Held (1), that the evidence warranted a finding that the defect had existed for such a length of time as to attract the attention of the municipality, and that its omission to repair same was negligence; (2) that the defect was not so inconsiderable as not to be discovered by the exercise of such reasonable care as the municipality was bound to maintain.

In *Williams v. Hays*, 52 N. E. 589, the Court of Appeals of New York had this state of facts before them. The captain of a brig, after working hard to save it from a storm, became exhausted. Tugs passing offered him assistance, which he declined, and he seemed dazed and made irresponsible answers to questions. The brig was unmanageable and drifted upon the beach. This action was against the master for the negligent destruction of the vessel. Held, that if the master was suffering from temporary insanity, resulting from exhaustion caused by his efforts to save the brig, he was not liable.

The Supreme Court of Wisconsin, in *Green v. Ashland Water Co.*, 77 N. W. 722, decided that where a water com-

NEGLIGENCE (Continued).

**Water Company's Liability for Furnishing Impure Water**      pany's source of supply was contaminated by sewage for a long time, several years, and the fact that it annually caused epidemics of typhoid fever was a matter of common knowledge, the presumption is that the members of such community of ordinary intelligence have notice of the situation, and in the absence of contrary evidence, this will preclude a recovery by a person injured by the use of such water, because of his contributory fault.

The sewage of a city was drained into a bay, and it was from this bay that the company took its water. The water of the bay had been polluted for years, all of which the plaintiff knew, and as he was an intelligent, reading, workingman, taking one of the city's papers, where the dangers of taking water from the bay was discussed, he must be taken to have contributed to the injury which resulted from his having typhoid fever.

PLEADING AND PRACTICE.

**Execution Against Choses in Action**      Choses in action cannot be levied upon and sold under a *fi. fa.* Therefore an alleged sale, under such an execution, of the right, title and interest of the defendant in and to a policy of insurance, passed no title : *Building and Loan Ass'n v. Maher*, 9 Pa.

Sup. 340.

The exceptions to this are quite numerous in Pennsylvania. See the opinion of Mitchell, J., in *Farnsworth v. Flagg*, 12 W.

**Note that there are Exceptions in Pennsylvania**      N. C. 500 (though his instance of a *patent* seems to us not correct). "The common law reason for this is a technical one, *i. e.*, the incapability of manual seizure and delivery by the sheriff. In Pennsylvania the office and operation of a *fi. fa.* have been much enlarged," and examples are given—as the levy upon land, the sale of a corporate franchise under the Act of April 7, 1870. To these may be added the sale of an interest in a partnership.

The Supreme Court of Missouri has reaffirmed the rule that the courts of a state where a mortal wound was inflicted have jurisdiction, though the deceased died in another state: *State v. Garrison*, 49 S. W. 507. (For a discussion of this question see *United States v. Guiteau*, 1 Mackey, Sup. Ct. Dist. of Columbia, p. 48.)

## PLEADING AND PRACTICE (Continued).

The following interesting points were decided by the Supreme Court of the United States, in February last, upon appeal from the Supreme Court of the Territory of Oklahoma: (1) Where the ground of an attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court. (This recalls the Pennsylvania "Attachment under the Act of 1869." See Amended Act of May 24, 1887, P. L. 197.)

**Attachment  
Against  
Non-Resident  
of Territory,  
Authority to  
Issue Ministerial,  
not  
Judicial**

(2) The section of the organic act of the territory requires that all civil actions shall be brought in the county where a defendant resides or can be found. It was contended that under this act the court could not acquire jurisdiction of the person of the defendant by constructive service, by foreign attachment. Held, that in a proceeding by attachment of property, which is in the nature of an action *in rem*, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached.

**Jurisdiction  
by Proceeding  
In Rem**

(3) The requirement of the territorial statute that the plaintiff give bond as a pre-requisite to the issuance of an attachment against a resident, but requires no bond where the attachment is against the property of a non-resident, is not in conflict with the Fourteenth Amendment to the Constitution of the United States, or with the Civil Rights Act. The distinction between a resident and a non-resident is so broad as to authorize a classification. The power to grant the remedy in one case and to deny it in the other embraces the right to impose upon the one a condition not required in the other: *Central Co. v. Campbell Co.*, 19 Sup. Ct. 346.

**Requirement  
of Bond in  
Case of Resident  
and not  
in Case of Non-  
Resident is  
Not a Denial  
of Due Process  
of Law,  
or of the  
Equal Protection  
of the  
Laws**

When appellant dies after argument, but before decision, judgment will be entered before his death (Sup. Court of Cal.):

**Death of  
Appellant  
before  
Decision**

*Ede v. Cunco*, 55 Pac. 772. This practice calls to mind the rule in Pennsylvania founded upon legislation in England. In *Chase v. Hodges*, 2 Pa. 48, Burnside, J., said: "The statute of 17 Charles II, chap. 8, made perpetual by 1 James II, chap. 17, sect. 5, enacts that, when either party dies between verdict and judgment, the death shall not be alleged for error,

## PLEADING AND PRACTICE (Continued).

so that the judgment be had within two terms after verdict." It was, therefore, decided that the death of the defendant between verdict and judgment (if not more than two terms intervened) could not be assigned for error. And in *Wood v. Boyle*, 177 Pa. 621, the like ruling was made in the case of the death of the plaintiff after verdict before the entry of judgment.

In 38 AMERICAN LAW REGISTER (N. S.) 56, there was a reference to the decision of the Supreme Court of Pennsylvania in *Middleton v. Middleton*, 41 Atl. 291, upon Masters in Divorce the invalidity of appointments of masters in divorce. By an Act of Assembly, approved March 10, 1899, the Courts of Common Pleas are empowered to "appoint masters in divorce proceedings, and to adopt rules to regulate the proceedings before the master and fixing his fees." This will, doubtless, have the effect of restoring the recent practice in Philadelphia.

## PRINCIPAL AND AGENT.

The limitations of a wife's right to bind her husband as his agent are shown in *Detwiler v. Bower*, 9 Pa. Super. 473. Ad- Husband and mitting that a husband is liable for necessities for Wife, his family ordered by his wife, the court nevertheless held that, though medicines are necessities, Wife's Agency an expensive surgical operation is not—or at least that plaintiff should not have performed it without the knowledge and consent of the child's father.

## QUASI-CONTRACTS.

In *Capital Gas & Electric Light Co. v. Gaines*, 49 S. W. 462, the Court of Appeals of Kentucky cited with approval the language of the Supreme Court of Connecticut, in Mistake of Law, Voluntary Payment, Right to Recover *Northrop v. Graves*, 19 Conn. 554, where it was said: "We mean distinctly to assert that when money is paid by one under a mistake of his rights and duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, whether such mistake be one of fact or law; and this, we insist, may be done both upon the principle of Christian morals and the common law"; and decides that money paid to a gas company as meter rent under a mistake of law may be recovered, though the payment was voluntary.

## REAL PROPERTY.

Fee of Land Under Highway      An interesting state of facts raised the question of the extent of the easement of the public in land taken for a highway, in *Huffman v. State*, 52 N. E. 713 (Ind.). It there appeared that A's land was bounded by a highway, under which the B natural gas company had laid a pipe on the side of the road next A's land. The company afterwards sent men to take up this pipe, and A ordered them to desist from digging it up, alleging that they were guilty of a trespass on his land. In a prosecution of the servants of B for trespass, the court recognized the principle that the title to the land was in A to the middle of the highway, subject to the easement of the public, but held that the easement did not extend to the laying of pipes for natural gas, and sustained a conviction for trespass. The decision followed *Consumer's Gas Co. v. Huntsinger*, 14 Ind. App. 156, where it was held that the building of a pipe-line for gas along a highway is an additional burden upon the fee, for which compensation must be made to the owner. By statute in Indiana, it is made unlawful for a company to lay such a line without the consent of the abutting owner. It has been held that the owner of the fee may have an action of trespass or ejectment against any one who cannot justify his right to the use of the highway under the owner of the easement: *Cooper v. Smith*, 9 Serg. & R. 26; *Alden v. Murdock*; *Dubuque v. Maloney*, 9 Ia. 450; *Locks v. Nashua & Lowell R. R.*, 104 Mass. 1.

## SALES.

Vendor's Lien, Fraud of Vendee      A sold a tract of land to B, agreeing to accept bank stock in payment. Subsequently, the bank having gone into the hands of a receiver, A filed a bill alleging that he had been induced to accept the stock through misrepresentations as to the value thereof, and praying for a vendor's lien, for the deficiency arising from the failure of the stock, to equal its represented value. Held, that A could not affirm the contract and maintain a lien for the deficiency, but that his remedy was by rescission or at law by an action for damages for the fraud: *Graham v. Moffett* (Supreme Court of Michigan), 78 N. W. 132.

Fraud, Rescission      In *McKenzie v. Rothschild*, 24 South. 716, the Supreme Court of Alabama reasserts the rule laid down by the same court in *Maxwell v. Shore Company*, 21 South. 1009, that "a sale and purchase of goods is fraudulent and open to disaffirmance by the seller when the pur-

**SALES (Continued).**

chaser was, at the time thereof, insolvent, or in failing circumstances, and had the design not to pay for them, or had no reasonable expectation of being able to pay for them, and either represented that he was solvent or intended to pay, or had reasonable expectation of being able to pay, or failed to disclose his financial condition, or the fact that he did not intend to pay, or expect to be able to pay, for the goods."

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**STATUTE OF FRAUDS.**

A contractor, who had undertaken to build a house for B, became insolvent, and A, a sub-contractor, threatening to quit work, B told him to continue his work and that he would see that he was paid. In an action on this promise by A against B held, that it was not a promise to pay the debt of another within the statute of frauds: *Hall v. Alford*, 49 S. W. 444 (Court of Appeals of Kentucky).

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**STATUTES.**

In *Henrietta Mining & Milling Co. v. Gardner*, 19 Sup. Ct. 327, the Supreme Court of the United States reiterates the rule that a paragraph adopted by a territorial legislature from the code of another state is presumed to be taken with the meaning it had in that state.

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**SURETYSHIP.**

*First Nat. Bank v. Parsons*, 32 S. E. (W. Va.) 271, is a nice example of when a surety will, or rather will' not, be discharged by the creditor's conduct. It was held that he was not discharged either by the creditor's releasing an attachment against real estate because it was encumbered beyond its full value, or by the continuance of a suit against the defendant for a term. The underlying condition of the surety' right in each case is correctly stated to be that a surety cannot be discharged by any act which does not impair his rights or affect the creditor's remedy.

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**TRADE-NAME.**

An important decision on the right to the exclusive use of a geographical name as a trade-name has been made by the Supreme Judicial Court of Massachusetts, in *American Waltham Watch Co. v. United States Watch Co.*, 53 N. E. 141. The question raised at the hearing was whether the defendant should be enjoined against using the words "Waltham"



## TRADE-NAME (Continued).

or "Waltham, Mass.," upon plates of its watches without some accompanying statement which should clearly distinguish its watches from those made by the plaintiff. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business in the same town, and it was found that the word "Waltham" which originally had been used by the plaintiff in a merely geographical sense had, by long use, come to have a secondary meaning as a designation of the watches which the public had become accustomed to associate with the name, and that the defendant used the name to deceitfully divert custom from the plaintiff. The defendant contended that whatever its intent, it had a right to put its name and address upon its watches, and to require it to add words which would distinguish its watches from the plaintiff's would discredit them in advance. The court, acknowledging the abstract difficulties involved in the question, made a decree for the plaintiff.

The English House of Lords has affirmed the decision of the Court of Appeal in *Manchester Brewing Company v. North*

*Similarity of Names, Injunction* *Cheshire and Manchester Brewing Company*, [1898], 1 Ch. 539, noted in 37 AM. LAW REG. 572.

The court held that the Manchester Brewing Company—an old and well-known firm—could enjoin the use, by a new company, of the name, "North Cheshire and Manchester Brewing Company," although there might not have been intention to deceive: *North Cheshire and Manchester Brewing Company v. Manchester Brewing Company*, [1899] A. C. 83.

## TRUSTS.

The Supreme Court of Minnesota has decided, in *Dickson v. Barker*, 77 N.W. 820, that a promissory note given on consid-

*Contract to Become Trustee* eration that a trustee joins the maker with him in a trust, is given on an illegal consideration and void, even though the note is made payable to the *cestui que trust*, the *cestui* being ignorant of the transaction. In this case one of the directors of a savings association agreed to elect the maker of the note a director. The note was made payable to the company. Under the laws of Minnesota a savings association has no capital stock, and is to be managed exclusively in the interest of the depositors. After the vote was given and the payee elected a director, the company made an assignment. The receiver was plaintiff on the note.



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RESPONSIBILITY OF DIRECTORS OF CORPORATIONS FOR WRONGFUL ACTS. *Editor American Law Register:* The "Evening Post" of New York, in a note upon my article, "The Nature and Law of Corporations," 38 Am. Law Reg. (N. S.) 137, while agreeing generally with my conclusions and especially assenting to the statement that "the directors and not the stockholders should be held primarily liable for the wrongful acts of corporations," nevertheless goes on to say that "whatever considerations of equity or public opinion might seem to demand, nevertheless positive, written law compels the court to take the position that it is to the stockholders that third persons must look as the corporate body which has injured them. We do not think it would be safe to trust public

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discussed and the foundation laid for the future argument. If he had done so, he would have recognized that the conclusions followed as, of course, from such inquiry and that, therefore, any criticism of the former should be based on a criticism of the latter.

*Henry W. Williams.*

Baltimore ; April, 10, 1899.

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TAXATION ; SITUS OF PERSONAL PROPERTY ; INTERSTATE COMMERCE. A Statute of Utah authorizes a tax upon cars owned outside the state but temporarily within it. Acting under this law the

board of equalization of the state assessed and valued ten cars belonging to the Union Refrigerator Transit Company and the tax collector of Salt Lake County levied the tax apportioned to that county.

In order to avoid seizure of the cars the transit company paid the tax under protest and brought suit against the collector for recovery of same. *Union Refrigerator Transit Company v. Lynch, County Treasurer*, 55 Pac. (Utah) 639 (Dec. 10, 1898). The plaintiff claimed that the tax was illegally collected upon two grounds, first, that plaintiff being a citizen of Kentucky, having no place of business nor property within the State of Utah, except these cars transiently there for the purpose of delivering or receiving interstate freight and for no other purpose, that said cars had acquired no such *situs* within the borders of Utah as to give jurisdiction over them for purposes of taxation, and second, that such a tax is a regulation of interstate commerce and repugnant to the Federal Constitution. The defendant having demurred, the lower court sustained the demurrer and dismissed the action, and upon appeal this judgment was affirmed by the Supreme Court of Utah.

The court bases its decision as to cars having acquired a *situs* for purposes of taxation on two cases in the United States Supreme Court, *Pullman Palace Car Co. v. Penna.*, 141 U. S. 18 (1890), and *Adams Express Co. v. Ohio*, 165 U. S. 194 (1896), and refusal of the court to grant a rehearing in last case, *Adams Ex. Co. v. Ohio*, 166 U. S. 185 (1896). While this would seem decisive upon the point, an examination of these cases show that the question is a much closer one than would appear from the uniformity of the decisions. In *Pullman Palace Car Co. v. Penna.*, there was a vigorous dissenting opinion by Mr. Justice Bradley in which Mr. Justice Field and Mr. Justice Harlan concurred, while Mr. Justice Brown took no part in the discussion, not having been a member of the court when the case was argued.

In *Adams Ex. Co. v. Ohio*, a most elaborate and exhaustive dissenting opinion was delivered by Mr. Justice White in which Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brown concurred.

In the Pullman Case the majority of the court held a Statute of Pennsylvania valid, imposing a tax upon the capital stock of the Pullman Palace Car Company, taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in this and other states over which its cars are run. The court held that no general principles of law are better settled or more fundamental than that the legislative power of every state extends to all property within its borders, and that for purposes of taxation personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the state which imposes the tax. Also that it is equally well settled that there is nothing in the Constitution or laws of the

United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction, and cites in support of these propositions, among others, the cases of *Gloucester Ferry Co. v. Penna.*, 114 U. S. 196 (1884); *Western Union Tel. Co. v. Attorney General of Mass.*, 125 U. S. 530 (1887), and *Morye v. B. & O. R. R.*, 127 U. S. 117 (1887).

The court explains the exemption of ships engaged in interstate or foreign commerce from local taxation by pointing out that commerce on sea is so different from commerce on land that the same rules cannot be applied to both, and that a ship registered under the laws of the United States at a particular port cannot acquire another *situs* merely by touching at another port. *Railroad Co. v. Maryland*, 21 Wall. 456 (1874), is cited as so ruling this question as well as *Harp v. Pacific Mail S. S. Co.*, 17 How. 596, and *Morgan v. Parham*, 16 Wall. 471 (1872). The court after showing that this tax is a tax on property engaged in interstate commerce, and not a tax on a privilege, or on the goods or persons carried, and is therefore within the power of the state, holds that the mode of assessing the proportion of the capital stock of the company represented by their personal property in use in the state is a reasonable and valid one and constitutional.

Mr. Justice Bradley, in his dissenting opinion, takes issue at once with the majority of the court on the broad proposition that all personal property within a state is subject to the taxing power of the state. The rules applicable to independent nations are not always applicable to the States of the Union. The rights of the states are in many things restricted by the Constitution, and the right of a state to tax interstate commerce is one of those restrictions. The learned justice concedes that all property, real or personal, within a state and belonging there may be taxed by the state, but when property does not belong in a state another question arises. To illustrate, he says: "a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to police regulations of that state, but it would be repugnant to the Constitution of the United States to tax it." Case of the *State Freight Tax*, 15 Wall. 232 (1872); *Coe v. Errol*, 116 U. S. 517 (1885).

But when personal property is permanently located within a state for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the state and to the burdens of taxation; as well when owned by persons residing out of the state as when owned by persons residing in the state. It has acquired a *situs* in the state where it is found."

The justice points out that personal as well as real property may have a *situs* independent of the owner's residence even when engaged in interstate or foreign commerce, as, for instance, an office with its furniture of a steamship or railroad line. Such property would be subject to the *lex rei sitæ* and to local taxation. But the ships or cars of those lines, being the vehicles of interstate

or foreign commerce, having no fixed or permanent *situs* or home, except at the residence of the owner, cannot be taxed without an invasion of the powers and duties of the Federal Government, except where they belong; authorities to this effect being *Hays v. Pacific Mail S. S. Co.*, 17 How. 596 (1854); *Morgan v. Parham*, 16 Wall. 471 (1872); *Trans. Co. v. Wheeling*, 99 U. S. 273 (1878). Mr. Justice Bradley then points out that the question involved in *R. R. v. Maryland*, 21 Wall. 446, cited by the majority of the court, was the power of a state over a corporation created by it, in reference to its rate of fares and the remuneration it was required to pay to the state for its franchises, and that the question of the *situs* of the property could not arise. The decision in *Gloucester Ferry Co. v. Penna.*, 114 U. S. 196, clearly holds that only the property of the corporation having a *situs* in the state is taxable there, such as the wharf and ferry house, but the vehicles of commerce coming into the state or capital of the corporation is exempt. The learned justice, therefore, emphatically asserts that while ships or railroad cars are not to be free from taxation, they are not taxable by those states in which they are only transiently present in the transaction of their commercial operations. If this were not so a train of cars running from New York to Chicago could be taxed by every state through which they ran.

In the second case cited by the Supreme Court of Utah as authority for its decision, namely, *Adams Express Co. v. Ohio*, 165 U. S. 194 (1896), the facts were as follows: A Statute of Ohio authorized the board of assessors, in appraising the property of express companies, to ignore the return of actual value of personal property by the company and to arrive at a basis of assessment by taking the value of the entire capital stock of the company, or entire value in money of the property of the company, and to return for taxation such proportion of same as may be fairly said to be represented by the value in money of the property within the State of Ohio. The Adams Express Company returned for taxation real estate valued at \$25,170 and personal property consisting of horses, wagons, money, credits, etc., valued at \$42,065. The board of assessors found their capital stock at its market value was worth about \$16,000,000; that its gross receipts within the State of Ohio for the year had been \$282,181, and that a fair proportion of its total property within the State of Ohio, valued in money, was \$533,059.80. The Adams Express Company filed a bill in the United States Circuit Court to enjoin collection of the tax and the prayer was granted. The State Supreme Court subsequently having affirmed the validity of the law, the Circuit Court reversed its ruling and held that the assessments were valid. The Circuit Court of Appeals having affirmed the judgment of the Circuit Court, the case was taken to the United States Supreme Court.

Mr. Chief Justice Fuller delivered the opinion of the court, affirming the judgment of the Circuit Court of Appeals. This was not a regulation of interstate commerce, he held, because not a

tax on the company's business, but a tax on its property. All corporations engaged in interstate commerce should bear their fair share of the burdens of taxation, and as the court had repeatedly held in the case of railroads and telegraph companies that their property might be valued in the several states through which their lines or business extended, for purposes of taxation, by taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state without violating any Federal restriction, so in this case no more reason could be perceived for limiting the valuation of express companies to horses, wagons and furniture, than that of railroads, telegraph and sleeping-car companies, to roadbed, rails, ties, poles and wires, or cars. *The unity is a unit of use and management*, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented by tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. The court then goes on to hold that the *situs* of the property thus taxed is in the State of Ohio and is, therefore, subject to its jurisdiction and its regulation, and cites, among other cases, *Pullman Palace Car Co. v. Penna.*, 141 U. S. 18.

Mr. Justice White, in the dissenting opinion, starts out by laying down two propositions which he designates as elementary: first, that the taxing power of one government cannot be lawfully exercised over property not within its jurisdiction or territory, and within the jurisdiction and territory of another; and, second, that no state has any right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subject of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. He then points out that though the bill filed by the Adams Express Company set forth that the value of their personal estate within the State of Ohio was but \$42,065, and the state by demurring admits this to be so, yet the company had been assessed for taxation upon a valuation of \$533,095.80. The learned justice then says that this enormous increase in assessment must have been arrived at by going outside the state and taxing the capital stock of the corporation proportioned to the business done in the state to the entire business of the corporation. He directs attention to the language of the Supreme Court of Ohio in affirming validity of the law, in which they say: "The property of a corporation may be regarded in the aggregate as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated, not in parts, but taken as a whole." And again, "If, by reason of the goodwill of the concern, or the skill, experience or energy with

which its business is conducted, the marked value of the capital stock is largely increased, whereby the market value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the constitution, because goodwill and other elements indirectly enter into its value." He then points out that in considering the question of taxation in *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, the United States Supreme Court said, "The substance and not the shadow determine the validity of the exercise of the power," and says the learned justice, "testing the tax in controversy by the rule laid down in the Postal Telegraph Case, it becomes in reason impossible to conclude otherwise than that it is both in form and substance taxation by the State of Ohio of property beyond its jurisdiction, and that it is also an imposition by that state of a burden on interstate commerce."

Taking up the so-called *unit rule* as applied to railroad and telegraph companies, and treating such applications of the rule as *stare decisis*, he protests against its extension and shows that it could not apply to an express company. In the case of a railroad or telegraph company there is *physical unity*, but in case of an express company operating horses and wagons in different states the only *unity* is a *metaphysical one*. He illustrates the absurdity of such a metaphysical unity for purposes of taxation by supposing a banker in New York to open an agency in New Orleans, equipping an office with furniture worth \$250. The assessor on his next visit would say to the agent, "It is true that your entire tangible property is but \$250, but by reason of your use of certain elements of wealth in New York I will assess you at \$1,000,000."

In conclusion, the learned justice protests against the argument that we have entered upon a new era requiring new and progressive adjudications, and unless the court admits the power of the State of Ohio to tax to be as claimed, it will enable aggregations of capital to escape just taxation by the several states. This assertion, he says, is as unsound as the fictitious assertion of expediency by which it is sought to be supported.

This decision was so far-reaching and so far in advance of any other decision relating to the *situs* of personal property for purposes of taxation, that the counsel in the case did not accept the decision as final, but asked for a rehearing. It will be noted that the court not only held that personal property situated in the state was subject to state taxation, but that this tangible property by reason of a *unity of use* can draw to it intangible property, and that both may be taxed.

The petition for a reargument was refused in *Adams Express Co. v. Ohio*, 166 U. S. 185 (1896), in which the court, after reiterating its opinion that this was not a regulation of interstate commerce but an exercise of the state of its right to tax the property of the express company, laid down as a rule "that the capital



stock of a corporation and the shares in a joint stock company represent not only tangible property, but also intangible property, including therein all corporate franchises and all contracts, privileges, and goodwill of the concern; and when, as in the case of the express company, the tangible property of the corporation is scattered through different states by means of which its business is transacted in each, the *situs* of this intangible property is not simply where the home office is, but is distributed where its tangible property is located and its work is done." The temper of the court in refusing the petition for reargument was apparently not the best, for they stated emphatically that "no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is of necessity carried on through many states, from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

The court also explained that "whenever separate articles of tangible property are joined together, not simply by unity of ownership, but in unity of use there is not unfrequently developed a property, intangible though it may be, which in value exceeds the aggregate value of the separate pieces of tangible property." It would almost seem from this that the court was ready to reverse *Euclid*, had such action upon its part been necessary for the decision in the case.

It will be seen, therefore, from the foregoing, that while the decision of the Supreme Court of Utah is supported by decisions of the highest court of the land, yet that court itself was far from unanimous in arriving at these decisions, and it is by no means improbable that at a later day, with a slight change in the membership of the court, the same question may be decided the other way.

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CRIMINAL LAW; MANSLAUGHTER; SPIRITUAL TREATMENT OF DISEASE. After a lapse of twenty-two years the "Peculiar People" have added another instance of manslaughter to their long series of well meant homicides. The case of *Queen v. Senior* (Dec. 10, 1898), [1899] 1 Q. B. 283, is of unusual interest because of the altered positions assumed by the English court in regard to spiritual remedies when applied in lieu of medical aid. The first case of this nature arose in 1868, when parents were charged with manslaughter of a child because, pursuant to their belief as members of a sect called "Peculiar People," they failed to provide medical attentions for their infant when it was suffering from acute inflammation of the lungs. Instead, they prayed and anointed the child with oil, but notwithstanding these devotional exercises the child died. The court charged that there was a very great difference between neglecting a child in respect to food, with regard to which there could be but one opinion, and neglect of medical treatment, as to which there might be many opinions; and cited the General Epistle of Saint James (v. 14-15) upon which the Roman Church



founds the doctrine of extreme unction and the Mormons and "Peculiar People" rest their practice of healing the sick by anointing and prayer only. The jury accordingly brought in an acquittal. In the like case of *Reg. v. Hurry* (1892), 76 C. C. C. Sessions Paper 63, a contrary result was reached, but in *Reg. v. Hines* (1874), 80 C. C. C. Sessions Paper 309, Baron Pigot expressed a strong opinion that the indictment of a parent for omitting to provide proper and sufficient medicine could not be sustained. "That he may be one of those persons who have very perverted views and very superstitious views, and may be altogether mistaking that doctrine of Scripture from which he has taken his course of proceeding in this case, may be perfectly true; but that there is anything in the nature of a duty neglected, that is, a duty which he knew or believed to be such, in this instance I am clearly of the opinion the evidence does not show." If the community recognizes medicine as a necessity, it is questionable whether the parent's opinions should be considered, but the strength of the above argument is recognized by Coleridge, C. J., in *Reg. v. Downs*, [1875] 13 Cox C. C. 111, although a conviction was there sustained because of the Statue 31 & 32 Vict. c. 122, s. 37. This makes it an offence punishable summarily, if any parent willfully neglects to provide medical aid for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been seriously injured. The weight of opinion in these cases is clearly to the effect that at common law medicine is not a necessity in the sense that food or clothing are, and that a parent will not be held responsible for withholding it if actuated by honest though erroneous motives. In the recent case of *Queen v. Senior*, the prisoner was indicted for neglecting to provide medicine for his nine months' old child, who had died of diarrhoea and pneumonia. The father was in most respects kind and careful but entertained an exaggerated idea of the power of prayer, and, like the Christian Scientists, fancied the use of medicine indicated a want of faith in the Lord. The Court of Queen's Bench in Banc sustained a verdict of manslaughter, founded on the Statute 57 & 58 Vict. c. 41, s. 1, which provides that "if any person over the age of sixteen years, who has the custody, charge, or care of any child under the age of sixteen years, wilfully . . . neglects . . . such child . . . in a manner likely to cause such child unnecessary suffering, or injury to its health, that person shall be guilty of a misdemeanor." It is observable that medicine is not mentioned in this act which supersedes the earlier statute, and the court remarked that "the question were narrowed down to whether his failure to provide medical aid could be called neglecting the child so as to cause injury to its health." Lord Russell, C. J., said, "I agree with the statement in the summing up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation, which would not have been thought so in a preceding generation, and that regard must be had

to the habits and thoughts of the time. At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omissions to provide medical aid for a dying child does not amount to neglect." This ingrafting upon earlier decisions is accentuated by the closing paragraph—"I wish to add that I dissent entirely from the view attributed to Pigott, B., in *Reg. v. Hines*, and I was not satisfied that, in the present case, there was not sufficient evidence, at common law, to justify a conviction." We thus have a decision that failure to provide medicine for a child is culpable neglect in the parent, and a strong intimation that it would be deemed such neglect as to warrant a conviction of manslaughter at common law. The thought naturally suggests itself as to how far this decision may be applied to Christian Science practitioners. If the view be accepted that an attempt to cure by prayer is foolhardy presumption or gross negligence, it would seem in accordance with American decisions (*Com. v. Pierce*, 138 Mass. 165 (1884)), that a Christian Scientist who advertises himself as a healer of diseases would be culpable if, in the face of death, he were to apply no other remedy. Further decisions will be watched with great interest for a solution of this problem which is one of practical importance in those states where spiritual treatment of disease is held not to be covered by statutes regulating the practice of medicine.

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INFANT AS BAILEE. A recent decision in the Supreme Court of Nebraska (*Churchill v. White*, 78 N.W. 369) has augmented the weight of authority with respect to this class of cases by holding an infant (nineteen years of age) liable in tort for injuries done to a hired horse and buggy. The contract of bailment, it appeared, contemplated a drive of five miles to a definite place and return, in breach of which the defendant drove fifty miles in an entirely different direction and returned with both the horse and buggy damaged.

The court affirmed the ruling of the lower court, that "the rule that one who hires property of this kind for one purpose, and uses it for an entirely different purpose than that contemplated by the parties in the contract of hiring, is liable for any harm that may happen to it while using it, applies to minors as well as adults."

This decision is in strict accordance with the trend of decisions now followed in most states. The contrary doctrine, so strongly upheld in Pennsylvania, is emphatically expressed by Rogers, J., in *Penrose v. Curren*, 3 Rawle, 351 (1832). "The foundation of the action is in contract, and, disguise it as you may, it is an attempt to convert a suit originally in contract into a constructive tort, so as to charge the infant." This result is reached by a strict adherence to the rule which frees infants from liability on contracts for other than necessities; it originated in the desire of courts to protect or shield infants from the consequences to which their youth and credulity might lead them. But when it

appears that the infant has committed a wilful tort, entirely distinct from the contract of bailment, the reason for such a protection should cease. "Where the infant stipulates for ordinary care in the use of the thing bailed, but fails from want of skill and experience and not from any wrongful intent, it is in accordance with the policy of the law that this privilege, based upon his want of capacity to make and fully understand such contracts, should shield him." (*Eaton v. Hill*, 50 N. H. 235, 1870.) But when the property is bailed to the minor for a specific purpose, and he uses it for a different purpose from that for which it was bailed, the bailment is thereby determined; and if the wrongful act determines the contract, why can tort not be maintained for the act, which is entirely independent of the contract? Truly the tort, though concerned with the subject-matter of the contract, is such that, but for the contract, there would have been no opportunity for committing it; yet it is, nevertheless, independent of the contract in the sense of not being an act contemplated by it, or being an act expressly forbidden by it. (Pollock, *Contracts*, p. 55.) Only for the purpose of measuring the duties between the parties is the tort related to the contract, and only so far can it be "an attempt to disguise the contract."

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## BOOK REVIEWS.

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A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW.  
By JAMES BRADLEY THAYER, LL.D., Weld Professor of Law at  
Harvard University. Boston: Little, Brown & Co. 1898.

Stephen's Digest of the Law of Evidence is so popular with the profession in this country and its use in American law schools is so general that, when a new book on evidence appears, one almost unconsciously compares it with the work of the distinguished Englishman. In the present instance, however, the comparison becomes a contrast because the two books are so unlike. Stephen tells us in his preface that a study of Mill's Logic furnished the starting point for his attempt to state the law of evidence. He deliberately undertook to treat the subject as "one case of the general problem of science, namely, inferring the unknown from the known." His book, therefore, is the result of undertaking to "point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law." It is dangerous to conduct an historical investigation with a view to the establishing of a striking and attractive analogy. The investigator is almost certain to "force a balance," as the accountants say. It is not surprising, therefore, to find that Stephen has failed to lay due stress upon the fact that, at the common law, it is *the jury* that is seeking to ascertain the unknown. Stephen confounded the logical processes of the individual with the operation of that body

of rules which was suggested to our ancestors by experience and designed by them to aid and control the jury in its work. To Stephen the law of evidence is applied logic. To Thayer, on the other hand, it "is the creature of experience rather than logic" (p. 267). "Evidence," in Stephen's view, means that one fact is or is not a premise from which the existence of another is a logical inference. In Thayer's view the chief characteristic of the law of evidence is the rejection, on *practical grounds*, of matter which is logically probative. After observing that this branch of the Common Law is "the child of the jury system" (p. 266), he says: "It is here that Mr. Justice Stephen's treatment of the law of evidence is perplexing, and has the aspect of a *tour de force*. Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter, and by the over-ingenious attempt to put the rules of evidence wholly into terms of relevancy. It is to be observed that by relevancy he always means logical relevancy; the common but uninformative distinction between legal and logical relevancy is not made by him. This attempt goes far to deprive his work of permanent value; it is impossible thus to take the Kingdom of Heaven by force. One who would state the law of evidence truly must allow himself to grow intimately acquainted with the working of the jury system and its long history." That Professor Thayer has allowed himself the intimate acquaintance of which he here speaks, no one who reads the first five chapters of his book can doubt. These chapters deal with "The Older Modes of Trial," "Trial by Jury and its Development (three chapters), and "Law and Fact in Jury Trials." Realizing, as Stephen did not, that the study of the Common Law is in its nature historical, Professor Thayer has betaken himself to the original sources, and the work that he has done upon them is in the best sense scholarly. It is interesting to scan his list of citations of "Year Book and Other Early Cases" (p. 29), and to note his table of Laws, Statutes and Ordinances consulted" (p. 34). When the reader discovers that every institution, every doctrine, every rule, is traced step by step from its first manifestation until it has attained its final form he feels that he is in the hands of a searcher after historical truth, and not of one who is manipulating history in the interest of a preconceived notion.

Stephen's book was the work of a brilliant lawyer who had practiced actively and had had a wide experience upon the bench. Professor Thayer's is the product of the university life. The author has, indeed, had large experience at the bar, but we cannot be wrong in supposing that this book is the result of labors in the library and the class room. It is sometimes said that those who spend their lives in law school work are dreamers—theorists, upon whom the "practitioner" may properly look with suspicion. No good thing, it is supposed, can thrive in such an atmosphere. Yet Stephen's Indian Evidence Act, on which his book is based, is an

utter failure in practice. It is productive of much uncertainty and great confusion. It is condemned alike by the bench and by the bar. The book before us, however, is eminently practical, for it exhibits the law of evidence as it has been and as it actually is—and nothing is as practical as *truth*.

The author has done the profession a service in Chapter VII, "Judicial Notice." The true nature of the subject is discussed and some valuable suggestions are thrown out as to the way in which a judicious development by the bench would result in shortening jury trials. Chapter VIII deals with "Presumptions." Presumptions do not belong to the law of evidence; to confuse them with questions of evidence is to invite error. They "are aids to reasoning [see Chapter VI] and argumentation which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted, by assuming its existence" (p. 314). The treatment of this subject is one instance of many in which the author has succeeded in detaching from the law of evidence (to use his own phrase) collateral matters "which overlie and perplex the main subject." Another instance is the treatment of "Burden of Proof" in Chapter IX. The different senses in which the phrase is used are pointed out and it is detached from evidence and classified under the heads of pleading and legal reasoning.

To the practicing lawyer the discussion of the "Parol Evidence Rule" in Chapter X and of "The Best Evidence Rule" in Chapter XI, comes as a welcome relief after the perplexing and misleading dissertations which one is wont to find in the text books. If the reader of this review is disposed to test the validity of the opinions here expressed he will do well to read these two chapters. The prediction may be hazarded that a hundred octavo pages will give him a clearer conception of these two much-misunderstood "rules" than any amount of reading and research which he can indulge in elsewhere. As to the former "rule," the conclusion is reached that the greater part of the subject is matter of substantive law expressed in terms of evidence. As to the latter, the temptation to allow the author himself to speak is too strong to be resisted. At page 506 he sums up Chapter XI, as follows: "Upon the whole, then, it may be said that the Best Evidence Rule was originally, in days when the law of evidence had not yet taken definite shape, a common and useful phrase in the mouths of judges who were expressing a general maxim of justice, without thinking of formulating an exact rule; and that Gilbert, in his premature, ambitious, and inadequate attempt to adjust to the philosophy of John Locke the rude beginnings and tentative, unconscious efforts of the courts, in the direction of a body of rules of evidence, hurt rather than helped matters. By holding up this vague principle as the 'first

## BOOK REVIEWS.

it signal rule' of an excluding system, and imparting to our that period such systematized and far-looking aims in the of evidence, he threw everything out of focus. A cheap of philosophy took the place of an ordered statement of the In Gilbert's attempt to deal exactly with the question, he ven to take away from the large principle of the Best e a chief part of its natural and intended reach, and to turn narrow declaration that you must not offer anything which ports that it is a substitute for something better. Such a n was necessary, if one would have an exact rule. But it necessary for those larger purposes which thus far it had

The judges, as often happens, knew what they needed an the book-writers, even if the book-writer was himself a s Gilbert was. Gilbert's definition was, indeed, one appli- f the larger principle that they used in licking into shape w hantling of a law of evidence; but that was all. And ot on applying maxims of sense and justice, and this one, others, in its wide, natural sense, until these hardened into one ther definite and specific rule of *nisi prius* practice, and be- r present law of evidence. Lord Hardwicke's utterance about eing 'but one rule of evidence, the best that the nature of will admit,' had no such limited notion as the followers of sought to put upon it. It was that same broad, untechnical ion of a general principle of justice, impossible to be into a definite rule of exclusion, with which Holt and his oraries began. The attempt to use it, on the one side, as of the existence of any excluding rule at all, and, on the s in itself a definite working rule of wide reach and signifi- vere both dealt with justly by Chriatian, a hundred years ur experience since then may show us, I think, that we lp to clear the subject, and keep our heads clear, if we drop ie and the notion of any specific separate rule of the Best e. In doing that, we need not dismiss the great maxim of ling that animated the judges who brought in this phrase many applications, used it for a century in shaping the law; iple which says, not that one must always furnish the best e, and, in the absence of it, have all else excluded; or, that oes the best he can, this will always be enough, but that morally speaking, the fact that any given way of proof is a man has, must be a strong argument for receiving it, if it fair degree probative; and the fact that a man does not pro- : best evidence in his power must always afford strong ground cion."

reader will now understand exactly why Professor Thayer book "a preliminary treatise." His exposition of the true of the law of evidence and the discrimination by him of mproperly absorbed into it have left him free to present to concise statement of the existing law of evidence." This, Introduction, he leads us to look for before long. In the



meantime he outlines the subject in Chapter XII—"The Present and Future of the Law of Evidence." A study of this chapter cannot but be helpful to judge or practitioner. To the student it is invaluable. In Appendices A, B and C, the author has reprinted a suggestive article on "Presumptions" from 6 Law Mag. 348 (Oct., 1831), a portion of a lecture delivered by the author on "The Presumption of Innocence in Criminal Cases" and Hawkins's Essay on "The Principles of Legal Interpretation."

When Pollock and Maitland wrote the introduction to their History of English Law they named Thayer among those whose work in certain fields made it necessary for them to pass over that ground in cursory fashion in order to avoid "vain repetition." It is safe to say that the work which he has now placed before the profession has likewise been done once for all.

G. W. P.

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THE LAW OF TRADE AND LABOR COMBINATIONS AS APPLIED TO BOYCOTTS, STRIKES, TRADE CONSPIRACIES, MONOPOLIES, POOLS, TRUSTS, ETC. By FREDERICK H. COOKE, of the New York Bar. Chicago: Callaghan & Co. 1898.

The author has treated this comparatively new subject, on the whole, in an interesting, logical, and as thorough a manner as can be expected in one volume. He works his way with a forceful, fair, and masterful hand through "the deplorable confusion and conflict of decisions" to principles and their application.

His classification of Combinations Producing Private Injury and Combinations Producing Public Injury, while apparently new, is entirely satisfactory. He entirely discards the *intent* to injure as an element of civil liability, and claims to present, for the first time, the fundamental and universal test of civil liability for an act of a trade or labor combination; his test being, *whether the act is the natural outgrowth of some existing lawful relation*. The difficulty of applying the test to some cases is frankly recognized by the author, and he is often met with decisions opposed to his test.

For instances of the difficulty in applying such test one needs only to refer to the passages of the book dealing with the matter where there is only the general relation, as members of society, existing between the parties. Also in the matter of Boycotts, as is seen in the latter part of section nine, on page forty-three, and a few following pages. The difficulty is here met, in a manner, by the author's definition of boycott.

Section three, and the authorities there given, are frequently cited to support the test stated as the true one to determine whether or not an act creates civil liability, and to show that the act is not made an illegal one by an intent to injure, and this section might well be supported by more leading cases. It is interesting and profitable to compare sections three and ten, especially, with the view of considering the well established doctrine of civil liability



there referred to (§10) and to observe that it is traced to its origin through the dissenting opinion of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216 (1853). That well established doctrine being in conflict with the author's test, and claimed to be mischievous in its results, he suggests that the best way to get the needed relief against it, is by legislation.

It is well worth the trouble to compare thoughtfully the recognition, at the foot of page sixty-two, that "acts producing a fear of violence to person or property" create a liability, with the statement on pages sixty-six and sixty-seven that the idea that the doctrine also applies to fear of injury to business, is not well founded; because, for the reason, that a *fear* of an injury to business, and an *injury* to business have no independent existence. They have no independent existence, as distinct from an injury to persons or property.

Section fifteen, containing a discussion of acts producing a reasonable fear of unlawful injury, and acts producing fear of lawful injury, is of peculiar interest.

An examination of the cases cited on the point seems to justify the remark that the word "written" should be inserted before the word "words" in the following statement on page eighty: "the remedy by injunction has been extended beyond mere bodily acts producing injury, to the use of words producing injury."

The author has faithfully adhered to his purpose, in the second division of the treatise, to point out and support by authorities the existence and value of the two tests of liability where combinations cause public injury.

Section twenty as to the scope of legislation by Congress and by the states; section twenty-two as to the test of legality of restriction on competition; and sections twenty-eight, twenty-nine and thirty discussing the criminal liability and the civil remedies in case of such restrictions are all carefully written and as usual well supported by leading cases. The last section in the book deals ably with the subject of restrictions by corporations upon competition.

A valuable feature of the volume is the appendix containing constitutional and statutory provisions relating to the topics treated under the first classification.

Mr. Cooke has certainly given to the student and practitioner a valuable work.

W. C. J.

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THE LAW OF MINES, QUARRIES AND MINERALS. By ROBERT FORSTER MACSWINNEY, M. A., Barrister-at-Law. Second Edition. London: Sweet & Maxwell, Ltd.

The author has given us a complete work of 900 pages covering the law as applied to mines and minerals in England.

The preface contains a brief review of the recent changes in the law by decisions of courts and by statutes. There is a well-arranged

and complete table of contents, a full table of cases and a table of statutes.

The text, covering 743 pages, is an exhaustive treatise of the law pertaining to mines and mining, and is divided under such sub-heads as Property and Possession, Workings and Uses, Contracts, Sales, Leases, Licenses, Neighbors, and Local Rights and Customs.

The book is peculiarly applicable to England, but the general principles discussed and pointed out makes it of general interest to the profession.

*H. W. M.*

BOUVIER'S LAW DICTIONARY. Rawle's Edition, Vol. II. Boston : The Boston Book Company. 1897.

The second volume of Mr. Francis Rawle's revision of what has long been the acknowledged head of legal dictionaries, is fully up to the high standard set by the first volume. It includes words of art and phrases from and including "Jacens" to "Zoll-Verein." The volume contains 1254 pages of double column, closely printed matter, consisting of all the terms appearing in the former editions of the work, together with many additions.

That the book is brought thoroughly up to date appears from the fact that, on page 1174, *et seq.*, title "United States Courts," is found an abstract of the Bankrupt Act of Congress, approved July 1, 1898. The editor has copiously annotated each statement by references to very recent decisions, many of them appearing from courts of the highest authority within the last two years.

The effort has been made, and successfully, to make the revision more than a mere definition of terms. To that end the general rules of law on any particular subject are arranged in proper place. For instance, the title "Pledge," to which a half column only is devoted to definition, occupies ten columns of the book, setting out the various rules of decision. Again, the title "United States Courts" is enlarged to cover seventeen full pages.

Another particularly meritorious part of the book is found under the title "Maxims'." Forty pages are filled with legal maxims and their meaning. The list comprises all the legal maxims, at least all that any practitioner will find time to learn.

Many other points of merit might be picked out, but it is deemed sufficient to refer the book itself to the profession as the best proof of its excellence.

*B. D. R.*

THE LAW RELATING TO BUILDING AND LOAN ASSOCIATIONS, WITH FORMS AND SUGGESTIONS. By WILLIAM M. THORNTON and FRANK H. BLACKLEDGE. Albany, N. Y. : Matthew Bender. 1898.

Prior to the appearance of this volume, the best known work in

this country on building associations, was that by Thompson, published in 1892. The second edition of the well-known treatise of the Hon. G. A. Endlich appeared in 1895. The present work is in two parts: *First*, an extensive discussion of the legal aspects of building associations; *second*, appendices of over four hundred pages. One of the novel, and perhaps the principal feature of the book, is the use that the authors have made of the excellent treatise of Mr. Scratchley on Building Associations, a work but little known in this country. From such examination as we have been able to give to the appendices, we have every reason to believe that anyone having a practice among building associations will find many useful hints and aids from the forms published. A specially valuable portion of the appendices is the publication of all existing state laws on the subject of the work conveniently arranged. The discussion of the case law appears to be complete and accurate.

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A GUIDE TO THE LAW OF LICENSING. By B. STEPHEN FOSTER.  
London: Waterlow & Sons, Limited. 1898.

Those in this country interested in the regulation of the sale of intoxicating liquors will derive many valuable suggestions from the perusal of this work. It is an exhaustive examination of the system of liquor licensing existing at the present day in England and Wales. All the sections of acts which relate to a particular subject have been collected and grouped under their appropriate headings. Under each section of the act the prior acts rendered obsolete or affected by the section are referred to. There is also a complete annotation of all the cases in which the section has been construed by the courts. The whole, therefore, forms what we would call, in this country, an Annotated Digest of the License Laws.

B. F. V.

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## A VIEW OF THE PAROL-EVIDENCE RULE.\*— PART I.

§ 1. *Parol Evidence Rule not a Rule of Evidence.* An unfortunate employment of a terminology in which the subject cannot possibly be discussed with accuracy and lucidity, a lack of systematic treatment in its proper department and surroundings, and an inherent necessity for certain distinctions which are simple in themselves but are in application to individual cases often unavoidably indecisive and difficult to trace—these considerations alone would suffice to account for the confusion, the apparent inconsistency, and the discouraging difficulties that attend the so-called parol-evidence rule and make it perhaps the most troublesome in the whole field of evidence. No one can approach the subject, in any attempt to restate its limitations, except with a sense of temerity; and the following brief arrangement of the leading topics of the rule is offered merely in the belief that no new way of stating them can be more confusing than some of those now to be found, while a mode of statement discarding the evidential terminology,

\* The following pages were prepared for use in a forthcoming edition of Greenleaf on Evidence; they have not been altered for the present purpose except by the omission of some citations, cross-references and brief paragraphs.

and emphasizing certain related doctrines of substantive law, may make it easier, if not to solve the various problems, at least to appreciate what is the nature of the problem to be solved.<sup>1</sup>

(1) It is first to be noticed that the rule or rules concerned are not rules of evidence. They do not exclude certain data because those data for one reason or another are untrustworthy or undesirable means of evidencing something to be proved. They do not declare that something here is admissible evidence while something there is not. What the rule does is to forbid a certain thing to be proved at all, and this, of course, is in effect to declare that the thing is legally immaterial for some reason of substantive law. When a thing is not to be proved at all, the rule of prohibition is not a rule of evidence, even though the words "proof" or "evidence" are employed in stating the prohibition; just as, on a plea of self-defence to an action for battery, if we say that no evidence of the plaintiff's insulting words will be admitted, we mean that his words are no excuse for the battery. If, then, we dismiss once for all any notion that the parol-evidence rule is concerned with any doubts or precautions or limitations based on the nature of certain evidentiary matter, or indeed with any regulation about evidence, we shall have taken the first step to a clearer understanding of the working of the rule.

(2) It is next to be noted that the thing that is to be excluded as immaterial by the rule is not particularly anything that can clearly be described as "parol." Without attempting to discriminate the various possible senses of this word, it will be enough to note that, so far as it conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or did something not in writing, or is now offering to testify orally,—this impression is not the correct one. Where the rule is applicable, what is excluded may be written material as well as conversations, circumstances, and oral matter in general; and where the rule is applicable so

<sup>1</sup> For an acute analysis and historical examination of the whole subject, see ch. 10 in Professor Thayer's "Preliminary Treatise on the Law of Evidence."

as to exclude certain written material, nevertheless certain oral material may properly be considered. So that the term "parol" affords no necessary clue to the kind of material excluded; and it conduces to the intelligent use of the rule to dismiss any notion that oral or parol matters are inherently the object of its prohibition.

(3) Again, within the scope of the rule are usually treated two distinct bodies of doctrine, which do not properly touch each other, except in certain relations at certain points. One of these concerns the constitution of legal acts, the other concerns their interpretation; and the difficulties of principle and lines of precedents for these two subjects are as a whole entirely distinct, and cannot properly be subsumed under any single generalization or rule.

In short, then, the "parol-evidence rule" does not concern doctrines of evidence; nor is it to be tested by the oral nature of the fact to be proved; nor is there any one rule on the subject.

§ 2. *Constitution and Interpretation of Legal Acts; Parol-Evidence Rule.* A person's conduct is one of the chief sources of any changes that occur in his legal relations. The creation, transfer, and extinction of a right and of an obligation are made in great part to depend upon specified kinds of conduct on his part. This conduct, regarded as having legal consequences of the above sort, may be spoken of, in individual instances, as a legal act.<sup>1</sup> The terms or nature of the act vary, of course, according to the nature of the right or the obligation aimed at—a contract, a sale, a will, a notice, and so on; the substantive law specifies these terms appropriately in the various instances, and the various branches of the substantive law are to be sought for these essential terms of the conduct required to constitute an effective act.

Now the conduct which may go to make up the terms of a

<sup>1</sup> The true point of view has thus been obscured by our traditional handling of the subject in terms of evidence. The German discussions of the general subject, while of no service in elucidating our special problems, take a better standpoint for discussion; a profitable work is "Der Irrthum bei nichtigen Verträgen," by Rudolph Leonhard, Dumm-lers, Berlin, 1892.

legal act may normally be spread over various times and contained in various materials—as where a contract to sell goods may have to be gathered from conversations, letters, telegrams, price-lists, and other data. If there were no such rule as the “parol-evidence” rule, such would always be the various data in which would be sought the terms of the act. Conceivably, and frequently, they would not be found in a single utterance or a single writing, nor in writings nor utterances made at one time. But there is a doctrine, founded on sound policy and experience, which imposes restrictions upon the sort of data that are to be considered as effectively supplying the terms of a legal act. The restrictions thus imposed affect both time and material; *i. e.* they may require the terms of the act to be sought in the utterances or conduct of one occasion (forbidding a range over preceding occasions of the same negotiation); and they may require the terms to be contained in a special mode of expression, *i. e.*, writing or its equivalent (excluding the use of oral utterances).<sup>1</sup> Usually the two sorts of restriction are combined, *i. e.*, the terms of the act are to be sought in a single writing made at one time.

When do such restrictions become applicable, so as to have this effect of giving legal standing and validity to a single writing only, and of forbidding the consideration of all other conduct as supplying the terms of the legal act? The restrictions may become applicable in two kinds of situations: (1) where a specific rule of law provides that the act, to be effective legally, must be contained in a single writing, as where a will or a deed is required to be in writing; (2) where the parties to the act have by intention made a single writing the sole memorial and repository of its terms,—as where the parties to a contract finally, after sundry negotiations, embody in a single writing the terms agreed upon. This process of reducing the act’s terms to a single memorial, whether by re-

<sup>1</sup> It may be noted that, as Mr. J. Blackburn has acutely pointed out (when arguing as counsel in *Brown v. Byrne*, 3 E. & B. 703), the parol-evidence rule might conceivably apply even to an oral utterance constituting the final fixing of the terms, thus excluding other oral utterances; so also *Gilbert v. McGinnis*, 114 Ill. 28; but practically this possibility need not be considered.



quirement of law or by intention of the parties, may be, for convenience of discussion, termed Integration, *i. e.*, the constitution of the whole in a single memorial.

This principle is well established and unquestioned in the law. The difficulties that arise are concerned with the scope of its application. The effect of the principle is an exclusionary one, *i. e.*, to reject from consideration, as having no legal standing and effect, data of conduct other than the sole written memorial. The matter thus excluded has come to be termed "parol evidence," although, as already pointed out, it is not evidence and not necessarily in parol. As the question usually comes up in a court, a writing is received from one party; and then matter other than this writing, and tending to overturn its legal effect, is offered by the other party, and is objected to by the first party by virtue of the present principle. The inquiry is thus presented whether the data thus offered in opposition are obnoxious to this rule of Integration. In other words, granting that there is a writing by the party or parties, is this sufficient to exclude the opposing data? Does the mere fact of the writing have that effect? Are there not many cases in which such data, although affecting the writing in the interest of the opponent, are nevertheless receivable without being obnoxious to the Integration rule? Unquestionably there are such cases; but the difficulty is to draw the line consistently and to expound the reasons soundly and systematically. The great mass of the rulings upon the parol-evidence rule are concerned with the attempt to draw this line and define these situations. The various cases in which such data are receivable seem to fall under the following heads:—

I. (1) It may always be shown that no legal act at all has ever been consummated or that some defence or excuse exists which overturns or sets aside an act conceded to have been done. (a) Under the first of these heads, there are certain constantly recurring situations, depending somewhat for their solution upon the particular department of law (contracts, wills, etc.), yet capable of being discussed in general terms applicable to all legal acts. They concern the will or con-

scious volition of the person in setting his hand to the act; and the question is whether he has after all consummated any legal act at all or an act of the alleged tenor, *i. e.* whether it is to be treated as his act (that is, an act having the supposed legal consequences) if he has merely drafted its terms but not finally willed to execute it, or if he has done it with the understanding that it is to be only morally binding, or if he has done it subject to another's approval, or if he has signed a writing without reading it over, and the like. (*b*) The second of these heads deals with the effect of some accompanying circumstance as making the act, though consummated and intrinsically effective, potentially avoidable, *i. e.* subject to some defence or excuse which will enable the actor to repudiate it or set it aside or successfully defend against the consequences, *e. g.* whether fraud, or an agreement to hold in trust or for security, will avail for this purpose. Thus, these two kinds of situations allow a consideration of all data by which it appears, as a rule of substantive law (*a*) that no legal act has been consummated at all, or (*b*) that the act, though consummated, is subject to avoidance upon grounds justifying such a defence.

(2) Independently of the preceding, it is further true that the Integration rule, excluding other data, does not apply unless there has been integration. Consequently, such extrinsic data may always be considered (*a*) where there has not been, by intention of the parties, any integration at all, or (*a'*) only a partial integration, not extending to the matters in question; and (*b*) where the law does not specifically require an integration in writing.

II. Furthermore, a legal act existing, it has constantly to be interpreted in order to be made effective; for, since its terms will be found chiefly in words, and since words are merely symbols indicating external objects as to which the right or duty is predicated, the connection between these symbols and all possible objects must be ascertained in order to carry the terms into effects corresponding with their significance as predetermined by the party or parties to the act. In this process of Interpretation, various data have to be considered; and there may be rules of guidance for choosing or

ascertaining the proper meaning; a new series of questions arise, peculiar to this subject; but the general process of using the interpreting data is not obnoxious to the Integration rule.

These several subjects may now be examined in more detail.

§ 3. (I) *Constitution of Legal Acts*; (1) *Whether an Act has been Consummated at all*. Only a small part of conduct is legal conduct, *i. e.* conduct intended to have legal effectiveness. The same conduct may under varying circumstances be intended to have other sorts of consequences than a legal one or the particular legal one,—as where a person hands a parcel to another, or writes a letter; and the distinction will often turn entirely on the accompanying intent. In other words, whether an act of an alleged tenor has been consummated will often depend chiefly on whether an intention to do an act of that tenor accompanied the conduct in question. At the same time, since for reasons of policy designed to protect others in their dealings against undisclosed and undiscoverable defects in their rights, there may be cases in which the doing of the conduct itself, irrespective of the intention, must be taken as finally consummating the act. Thus the problem is to define these situations in which the effectiveness or validity of the act is to depend merely on its doing and apart from its intention. Put in the shape of a rule of exclusion, the question becomes: When may it not be shown that the intention of the actor was not to do an act of the sort apparently done? Observing that this is distinctly a question of substantive law determining the existence of rights and duties, and that the solution may well be different in different parts of the law, we may notice briefly the various types of situation. The alleged incompleteness of the act may be attributed to the circumstance (*a*) that the act was intended to have no legal significance at all, but only a moral or social one; or (*b*) that the act was provisional or preparatory only, and never finally willed as a consummated act; or (*c*) that though a legal act of some sort was intended, yet it was not this legal act, but an act of some other tenor, either wholly or in part.

(*a*) This variety of situation, while common enough, seldom

gives rise to legal controversy. An invitation to dine, extended to a friend, illustrates it, and is to be contrasted with the promise of a restaurateur to furnish a meal. An instance of a different sort is found in *Earl v. Rice*,<sup>1</sup> where it was allowed to be shown that an agreement, signed by husband and wife, as to the sale of her lands and the disposition of the proceeds for the benefit of the children, was understood between them to be only morally binding. In this aspect, the "parol-evidence rule" may be stated somewhat thus, namely, that conduct apparently having the form of a legal act may always be shown to have been done with the intent to assume only moral or social consequences.<sup>2</sup>

(b) This variety of situation gives rise to constant legal controversy, chiefly because it is often difficult to distinguish practically between such a total absence of effective intent as to leave the act merely inchoate and such a partial modification of the effect of a consummated act as concedes the consummation but violates the principle of Integration by improperly setting up a competing agreement to modify the integrated act. An instance of the less difficult sort is the writing of a draft promissory note for possible use, where the lack of intent to consummate a note leaves the writing without final legal significance. Again, in *Nicholls v. Nicholls*,<sup>3</sup> it was allowed to be shown that a paper purporting to be a will was written during a friendly conversation, in the course of which the writer put certain words on a paper, and said "That is as good a will as I shall probably ever make;" these words indicating possibly that the writing was intended merely as an experiment or suggestion. Instances of the more difficult sort are cases of contract-writings drawn up in complete detail and signed, but agreed not to be regarded as binding and consummated until the happening of some condition precedent. Thus, it may be shown that an agreement, though signed, was understood not to be a binding act until the signature of

<sup>1</sup> 111 Mass. 17.

<sup>2</sup> See *Gunz v. Giegling*, 108 Mich. 295; *Church v. Case*, 110 id. 621; *Grand Isle v. Kinney* (Vt.), 41 Atl. 130.

<sup>3</sup> *Prerog. Ct.*, Ann. Reg. 1814, p. 278.

another party was obtained,<sup>1</sup> or until the approval or consent of a third person should be obtained,<sup>2</sup> or that some other act should be done by a party or a third person.<sup>3</sup> On the other hand, an understanding which concedes that an effective legal act has been consummated but purports to affect the terms of the obligation, by limiting the conditions of default or specifying events on which it shall by condition subsequent cease to be binding, does not come within the above notion, and is excluded because it comes in competition with the terms of the written act under the principle of § 5, *post*; thus, an understanding that a note is to be payable out of certain funds only,<sup>4</sup> or that its payment will not be enforced at all,<sup>5</sup> or only upon certain conditions,<sup>6</sup> would not be considered.<sup>7</sup> Under the present head seems also to belong the class of cases in which it is desired to show that the person attempted to be charged as a party to a document did not sign as a part but only as a witness; this may be shown, because it means that as to that person there was no legal act.<sup>8</sup>

<sup>1</sup> *Pattle v. Hornbrook*, 1897, 1 Ch. 25; *State v. Wallis*, 57 Ark. 64; *Robertson v. Rowell*, 158 Mass. 94; *Kelly v. Oliver*, 113 N. C. 442; *Mfrs. Furn. Co. v. Kremer*, 7 S. D. 463; *McCormick Co. v. Faulkner*, *ib.* 363; *Gillman v. Gross*, 97 Wis. 224; see *Beard v. Boylan*, 59 Conn. 181.

<sup>2</sup> *Cleveland Ref. Co. v. Dunning* (Mich.), 73 N. W. 339; *Tug R. C. & S. Co. v. Brigel*, U. S. App., 86 Fed. 818; *Pym v. Campbell*, 6 E. & B. 370.

<sup>3</sup> *Blewitt v. Boorum*, 142 N. Y. 357; *Curry v. Colburn* (Wis.), 74 N. W. 778.

<sup>4</sup> *Stein v. Fogarty* (Ida.), 43 Pac. 681; *Mumford v. Tolman*, 157 Ill. 258; *Gorrell v. Ins. Co.*, 24 U. S. App. 188; *contra*: *Clinch Co. v. Willing*, 180 Pa. 165.

<sup>5</sup> *First Nat'l B'k v. Foote*, 12 Utah, 157; *Bryan v. Duff*, 12 Wash. 233.

<sup>6</sup> *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233; *Northern Trust Co. v. Hiltgen*, 62 Minn. 361; *Van Etten v. Howell*, 40 Nebr. 850; *Wilson v. Wilson*, 26 Or. 251; *Shea v. Leisy*, 85 Fed. 243; *Nebr. Expos. Ass'n v. Townley*, 46 Nebr. 893; *Taylor v. Hunt*, 118 N. C. 168; *Murchie v. Peck*, 160 Ill. 175.

<sup>7</sup> For other instances illustrating the above distinctions, see *Guidery v. Green*, 95 Cal. 630; *Ryan v. Cooke*, 172 Ill. 302; *Hanck v. Wright* (Miss.), 23 So. 422; *Western Mfg. Co. v. Rogers* (Nebr.), 74 N. W. 849; *Ellison v. Gray*, N. J. L., 37 Atl. 1018; *Lowenfeld v. Curtis*, U. S. App., 72 Fed. 103. Needless to say, the application of the distinctions in a given instance may offer much room for difference of opinion.

<sup>8</sup> *Garrison v. Owens*, 1 Pinney 473; *Isham v. Cooper*, N. J. L., 39 Atl. 760. In the law of negotiable instruments, several questions of an anal-

(c) In this situation the execution of some legal act is conceded, but it is desired to show that its purporting terms were, either wholly or in part, not intended by the party doing the act. The typical cases are those of one signing a blank paper afterwards filled out by another without any authority or differently from a limited authority; of a blind or illiterate person signing a document whose contents are, fraudulently or otherwise, incorrectly stated to him; of an ordinary person signing a document whose terms he has misread or has not read at all. Here there is opportunity for much difference of policy, depending on the nature of the act and the relations of the parties. In general, it seems fair to insist that, where the intention was to do a legal act of some sort, the efficient element is supplied, and the terms of the specific act intended should depend solely on the document and not on the unexpressed state of mind of the party doing the act; so that a mistake due to one or the other of the above reasons should be immaterial. At the same time there are certain situations in which policy may well allow a relaxation of this rule. In the first place, it need not be enforced in favor of a party who by fraud or carelessness has brought about the mistake—as in the case of one fraudulently misreading a document to an illiterate person.<sup>1</sup> In the next place, it need not be enforced where the writing is equally fallacious in representing the terms as understood by the opposing party; in other words,

ogous sort arise, but peculiar considerations apply in that field of the law; for example, the effect of a parol agreement that an indorsement in blank or in full shall be without recourse against the indorser; of an agreement that an indorsing payee is to be treated as guarantor, co-surety, or joint maker; of an agreement that joint makers or maker and indorser, or indorser and indorsee, are to be treated between themselves as sureties. In the law of agency, also, some special questions arise, governed by more or less peculiar considerations; for example, the effect of an agreement that a person signing a contract is to be treated as agent only, or that a person signing as agent is to be treated as also a principal; and the doctrine of undisclosed principal.

<sup>1</sup>See Harriman on Contracts, 35: *Thoroughgood's Case*, 2 Co. Rep. 9 b; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *O'Donnell v. Clinton*, 145 Mass. 461; *Wanner v. Landis*, 137 Pa. 61; *Bank v. Webb*, 108 Ala. 132; *Yock v. Ins. Co.*, 111 Cal. 503; *Green v. Wilkie*, 98 Ia. 74; *Coates v. Early*, 46 S. C. 220; *Hartford L. I. Co. v. Gray*, 80 Ill. 28.

in the case of mutual mistake, where in Chancery the reformation of the instrument is allowed.<sup>1</sup> In the third place, a testator signing a will is not in the position of one on the faith of whose act another party to the transaction may be misled, and thus there may be less objection than in the case of contracts to permitting the testator's ignorance of the contents, through misreading or otherwise, to be shown.<sup>2</sup> But all these questions are here seen, more clearly perhaps than in other parts of the subject, to be in truth questions in the various departments of substantive law concerned with the different kinds of legal acts; and broad and varying considerations of policy are concerned, into which it is not necessary here to enter.

§ 4. *Same: (2) Whether a Defence or Excuse Exists, Rendering the Act Voidable.* Assuming that a legal act has been done, it may be desired to show that some defence or excuse exists, by reason of which the act is voidable and may be repudiated. There is here no attempt to alter the terms of the act; it is conceded, and its terms are conceded; but an independent defence is set up. Whether this defence may be shown depends merely on whether the policy of the substantive law applicable to that class of acts recognizes the circumstance as rendering the act voidable and constituting a defence to its enforcement. The clearest case of this sort is that of fraud. The substantive law concerned determines when fraud is to be regarded as a defence, and what circumstances are to be regarded as amounting to fraud. But there is no objection to the showing of fraud from the present point of view, *i. e.* the constitution and integration of legal acts, because no effort is made to resort to other than the integrated act for ascertaining its terms; the terms are conceded to be represented by the writing only, and the object is to set up independent cir-

<sup>1</sup> See *Wilcox v. Lucas*, 121 Mass. 22; *Bush v. Hicks*, 60 N. Y. 298; *Andrews v. Andrews*, 81 Me. 337; *Stockbridge Co. v. Hudson Co.*, 107 Mass. 290.

<sup>2</sup> See *Guardhouse v. Blackburn*, L. R. 1 P. D. 109; *Fulton v. Andrew*, L. R. 7 H. L. 460; *Morrell v. Morrell*, L. R. 7 P. D. 68; *Stephen*, Digest of Evidence, 4th Ed., App. note 33, and Pref. p. 37; *Sheer v. Sheer*, 159 Ill. 591.



cumstances rendering the act voidable.<sup>1</sup> A showing of duress also, wherever the substantive law recognizes it as an available defence, is equally unobjectionable from the present point of view.<sup>2</sup> Possibly the proceeding for reformation on the ground of mutual mistake may be regarded as properly belonging under the present head. The more difficult case is that of an accompanying agreement to hold property as trustee or to hold it as security only. It may be suggested that the title to property can be regarded as capable of separation into various qualities or modalities—title as both beneficial and legal owner, title as legal owner only (with the beneficial interest in another), and title as security holder only (with the redemption interest in another). The simple transfer of ownership will in all cases transfer the bare legal title, but it may or may not carry with it the beneficial interest of the second or third sort. The title being thus separable into distinct elements, it is easy to regard the act of separating and retaining (by mutual understanding) the beneficial interest of the second or third sort as an independent circumstance which may be availed of to cut down the apparent interest of the title-holder, by way of defence or avoidance. Thus, where the circumstances are such as to justify, by the substantive law, the recognition of a resulting trust, there is no objection from the present point of view; and it may be shown just as fraud could be shown.<sup>3</sup> So also a retention of the redemption interest in the transferor, with the effect of giving the transferee a security title only, may be shown, as an independent circumstance constituting a defence to his apparent right to claim full and beneficial title.<sup>4</sup> But in the latter case it may happen that the act of transfer clearly purports to give not merely the bare legal title, an ele-

<sup>1</sup> *State v. Cass*, 52 N. J. L. 77.

<sup>2</sup> So also for infancy or other legal incapacity to act.

<sup>3</sup> *Felz v. Walker*, 49 Conn. 93.

<sup>4</sup> *Campbell v. Dearborn*, 107 Mass. 130; *Barry v. Colville*, 129 N. Y. 302; *Hieronymus v. Glass* (Ala.), 23 So. 674; *Ahern v. McCarthy*, 107 Cal. 382; *Shad v. Livingston*, 31 Fla. 89; *German Ins. Co. v. Gibe*, 162 Ill. 251; *Bever v. Bever*, 144 Ind. 157; *Libby v. Clark*, 88 Me. 32; *Dixon v. Ins. Co.*, 168 Mass. 48; *Pinch v. Willard*, 108 Mich. 204; *Vanderhoven v. Romaine*, N. J. Eq. 39 Atl. 129; *Voorhies v. Hennessy*, 7 Wash. 243; *Shank v. Groff*, 43 W. Va. 337; *Gettelman v. Assur. Co.*, 97 Wis. 237.

ment common to all transfers of title, but also the full beneficial interest, free from any redemption interest ; and where this is the case, all the possible elements of a title being accounted for and covered, a supposed retention of the redemption interest can no longer be regarded as a separate act available in defence, but comes directly in competition with the terms of the transfer, and is thus in this instance not available.<sup>1</sup> Another sort of independent act which, by setting aside the original act, substitutes a new one and furnishes a defence to any claim founded on the avoided one, is a novation ; this may be shown, whether it involves a novation in the full sense, *i. e.* a complete supersession of the original act,<sup>2</sup> or merely a change of some of its terms by subsequent agreement or waiver.<sup>3</sup> An agreement not to sue, or not to sue for a limited time, is perhaps not to be regarded, at least apart from equity, as an available defence ;<sup>4</sup> but an agreement to forbear forever to sue is in theory equivalent to a promise to give a release, and thus, in equity at least, is of the nature of a defence which can be set up in an action on the main contract.<sup>5</sup> But it may be difficult, in specific instances, to determine whether the agreement should be treated as genuinely one of the above sort or as merely an agreement limiting liability and thus of an admissible sort ; for example, an agreement not to collect more than a part of the amount of a note may be regarded as not available,<sup>6</sup> but an agreement to credit a certain counter-claim in payment may be given effect.<sup>7</sup> It may be added that where the facts to be shown negative the very existence or consum-

<sup>1</sup> *Thomas v. Scutt*, 127 N. Y. 133. Occasionally this is laid down as a general rule, in disregard of the distinction above noted ; see *Munford v. Green* (Ky.), 44 S. W. 419 ; *Goon Gan v. Richardson*, 16 Wash. 373.

<sup>2</sup> *Guidery v. Green*, 95 Cal. 630.

<sup>3</sup> *Goss v. Nugent*, 5 B & Ad. 863 ; *Smith v. Kelley* (Mich.), 73 N. W. 385 ; *Harris v. Murphy*, 119 N. C. 34 ; *Dunklee v. Goodenough*, 68 Vt. 113 ; *Chic., B. & Q. R. Co. v. Dickson*, 143 Ill. 368.

<sup>4</sup> *Ford v. Beach*, 11 Q. B. 852 ; *Dow v. Tuttle*, 4 Mass. 883. Compare the case of a contemporaneous agreement to renew : *Hoare v. Graham*, 3 Campb. 57 ; *Ames, Cases on Bills and Notes*, II, 124, note.

<sup>5</sup> *Dean v. Newhall*, 8 T. R. 168 ; *Harriman on Contracts*, 283.

<sup>6</sup> *Loudermilk v. Loudermilk*, 93 Ga. 443.

<sup>7</sup> *Bennett v. Tillmon*, 18 Mont. 28 ; *contra* : *Phelps v. Abbott* (Mich.), 72 N. W. 3.

mation of a legal act (as in § 3, *ante*), they may be shown as against any assignee of the supposed right created by the act, because he can obtain nothing if there was nothing to transfer to him; whereas, if the facts concern merely a defence or enable a consummated act to be avoided (as in the present section), the showing will, in some departments of the law, not be allowed as against a *bona fide* assignee for value of the right created by the act.<sup>1</sup>

§ 5. *Integration of Legal Acts by Intent of Parties; (1) Whether the Act has been Integrated at all.* The principle of Integration—*i. e.* refusing to recognize, as a part of the act or as furnishing its terms, anything but the final written memorial as adopted by the parties—assumes that there has been an integration into a final written memorial. It is therefore, of course, always possible to show that a writing offered as such has never been enacted by the parties as such a memorial, *i. e.* that there never has been an integration; and in such case any negotiations or parts of the transaction whatever may be considered in order to determine the entire terms of the act. A mere temporary or preliminary memorandum<sup>2</sup> or a series of letters,<sup>3</sup> for example, will usually not be such an exclusive memorial; though it is always a question as to the intent of the parties in the particular case. A memorandum made to satisfy the fourth and seventeenth sections of the Statute of Frauds is not as such and necessarily the exclusive memorial of the transaction.<sup>4</sup> A receipt, acknowledging the payment of money or delivery of goods, is not as such an exclusive memorial of the terms of a contract connected with the money or the goods;<sup>5</sup> though a document may be at the same time a receipt and the exclusive memorial of contract;<sup>6</sup> whence

<sup>1</sup> See *Dow v. Tuttle*, *supra*; *Martin v. Cole*, 104 U. S. 30.

<sup>2</sup> *Ramsbottom v. Turnbridge*, 2 M. & S. 434; *Doe v. Cartwright*, 3 B. & Ald. 326; *R. v. Wrangle*, 2 A. & E. 514; *Allen v. Pink*, 4 M. & W. 140; *Vaughan v. McCarthy*, 63. Minn. 221.

<sup>3</sup> *Burditt v. Howe*, 69 Vt. 563.

<sup>4</sup> *Browne*, Statute of Frauds, cc. 17, 18.

<sup>5</sup> *Singleton v. Barrett*, 2 Cr. & J. 368; *Equit. Secur. Co. v. Talbert*, 49 La. Ap. 1393; *State v. Giese*, N. J. L., 36 Atl. 680; *Keaton v. Jones*, 119 N. C. 43.

<sup>6</sup> See *Ramsdell v. Clark*, 20 Mont. 103; *Jackson v. Ely*, 57 Oh. 450; *Allen v. Mill Co.*, 18 Wash. 216.

arises the well-known distinction that a bill of lading, as a receipt for goods, but not as a contract of carriage, may be shown to be incorrect in its terms.<sup>1</sup>

§ 6. *Same*: (2) *Whether the Part of the Act in Question has been Integrated*. Even though there has been an integration, *i. e.* a reduction of a transaction to a final and exclusive written memorial, yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions and not another, or may integrate one part of a transaction and not another part, it is of course always open to show that the integration was partial only; and in such case the terms of the remainder, not covered by the written memorial, may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far the parties have intended it. Since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case,—including the kind of transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation.<sup>2</sup> No detailed rules can be formulated; and the working of the principle can best be understood by noticing its application in particular instances. For example, where a written lease was given, an oral agreement by the lessor to destroy rabbits on the leased land was admitted;<sup>3</sup> where a written lease of a house and the furniture therein was

<sup>1</sup> *The Delaware*, 14 Wall. 579; *Tallassee F. M. Co. v. R. Co.* (Ala.), 23 So. 139; McClain, *Cases on Carriers*, pp. 233-248; Hutchinson, *Carriers*, §§ 122 ff.

<sup>2</sup> It is occasionally said (*e. g.*, in *Naumberg v. Young*, 44 N. J. L. 331, whose language has been approved in *Thompson v. Libby*, 34 Minn. 374; *Seitz v. Refrig. Co.*, 141 U. S. 510), that the parties' intention as to the exclusive effect of the document is to be gathered exclusively from the terms of the document itself; but this is unsound in principle as well as impossible in practice; the fallacy is repudiated in *Eighmie v. Taylor*, 98 N. Y. 288, and has little support.

<sup>3</sup> *Morgan v. Griffith*, L. R. 6 Exch. 70.

made, an oral agreement by the lessor to put in certain furniture was excluded;<sup>1</sup> where a deed of land abutting on a street was made, an oral agreement by the vendor to have the street graded was admitted;<sup>2</sup> where a deed of similar land was made, an oral agreement by the vendor to pay for a sewer in the course of construction was admitted;<sup>3</sup> where a deed of two houses, with the lease of a hall, was made, an oral agreement to put hard-pine flooring into the hall was admitted;<sup>4</sup> where a deed of land and a store provided that "this grant includes all the shelving in the building," an agreement to sell personalty in the store was admitted;<sup>5</sup> where a written contract was made to give possession of the promisor's premises for the purpose of building, an oral agreement to provide certain room for storage purposes was excluded;<sup>6</sup> where a covenant was made to furnish a person's support, an agreement that the promisee would live at a certain place was excluded;<sup>7</sup> where a written lease of land was made, an oral agreement by the lessor to devise the lands to the lessees, on condition that they improved the premises and paid an annual rent, was admitted;<sup>8</sup> where a written agreement was made to board "three persons," an oral agreement specifying the three was excluded.<sup>9</sup>

Most of these instances are arguable, in the sense that a contrary decision could not be thought unsupportable; and in most of them the decisions have depended more or less on the attendant circumstances. But however arguable the ruling may be in a particular instance, the general notion is always the same and is everywhere accepted. The inquiry is, for each instance anew, Was the subject of the offered agreement intended by the parties to be covered or disposed of in the written memorial? If they intended that writing to represent

<sup>1</sup> *Angell v. Duke*, 32 L. T. N. S. 320.

<sup>2</sup> *Durkin v. Cobleigh* (Mass.), 30 N. E. 474.

<sup>3</sup> *Carr v. Dooley*, 119 Mass. 294.

<sup>4</sup> *Graffam v. Pierce*, 143 Mass. 386.

<sup>5</sup> *Bretto v. Levine*, 50 Minn. 168.

<sup>6</sup> *Dixon-Woods Co. v. Glass Co.*, 169 Pa. 167.

<sup>7</sup> *Tuttle v. Burgett*, 53 Oh. 498.

<sup>8</sup> *Harman v. Harman*, 34 U. S. App. 316.

<sup>9</sup> *Rector v. Bernaschina*, 64 Ark. 650.

the net result of their negotiations on that topic, then no other matter, whether oral or written, is to be consulted for ascertaining the terms of their act.—It is sometimes said that the test is whether the parol agreement “varies or adds to” the written memorial, or whether it is “inconsistent” with it. But these, it is obvious, may be fallacious tests; for, though an oral agreement which is inconsistent with or varies from the written memorial will always be ineffective and inadmissible, it is not true, conversely, that an oral agreement which is not inconsistent with the written memorial is admissible. Where the parties have clearly intended to cover the whole of a subject having many possible details, the promisor may not purport to make an engagement as to one of the possible details, and thus an oral engagement on that precise point is not in strictness inconsistent with the written memorial, nor does it vary the latter; yet it may be inadmissible if the memorial apparently intended to embrace the whole of the promise on the general subject to which that detail belongs; for example, a written contract of sale for an engine is in strictness not inconsistent with nor varied by an oral warranty of the engine’s working capacity, if the written memorial does not refer in any way to the engine’s capacity; yet such a warranty would be by most courts excluded. It seems more accurate in practice and more correct on principle to avoid such phrasings of the test, and to inquire, more broadly, whether the subject of the offered agreement has been intended to be wholly disposed of by the written memorial; if so, the agreement is not to be considered, whether it is consistent or inconsistent with the memorial’s specific terms.

The principle now under consideration finds frequent application where it is desired to imply into the contract a *custom* or usage which prevails for the class of transactions involved, and would be regarded, but for the written memorial, as an implied term of the contract. Ordinarily, parties do not intend to reduce to writing in the memorial all the usages applicable to the class of transactions involved; in other words, the scope of their intended integration includes only such matters as may or must vary with the particular transaction,

and not such matters as are uniformly arranged for by current usage;<sup>1</sup> thus, in an order for a large quantity of flour, the quantity, the quality, the grade of wheat, the consignee, the time and place of delivery, will naturally vary with the particular order, and a written memorial of the contract will therefore have necessarily for its object the reduction to certainty of these variable particulars; but the mode of manufacturing, the mode of packing, and the mode of marking, may by local usage be uniform in all cases, and hence there will usually be no occasion and no intention to deal with these matters in the written memorial; in other words, there has been on those points no intended integration; and therefore it is open to resort to current usage for the implied terms of the contract on those points. If, however, the writing, by mentioning one or another of those points, shows that there has been an intention to deal with the matter in the written memorial, or if such an intention can be otherwise ascertained, then the usage cannot be resorted to as furnishing a term of the contract. Usually, then, it may be said, that when the written memorial contains nothing on the subject of the usage offered, the usage (if of such a sort as by the law of contracts would be an implied term of the contract) may be resorted to, in spite of the existence of the written memorial. Here, however, as in all other applications of the present principle, the result will depend chiefly on the circumstances of each case.

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(To be continued.)

<sup>1</sup> "Parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. . . . The contract in truth is partly express and in writing, partly implied or understood and unwritten:" Coleridge, J., in *Brown v. Byrne*, 3 E & B. 703.



## GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART IV.

### III.—*The Practicability of State Interference with Transportation Contracts—Continued.*

The case of *Smyth v. Ames*<sup>1</sup> aroused great excitement, and widely different views have been evoked by it. Some authorities, as Prof. Frank Haigh Dixon, of Dartmouth College,<sup>2</sup> consider that the decision enunciates no new principle, and that no one need have been astonished by it. On the other hand, the Nation<sup>3</sup> cites the case as authority for the statement that "the attempt to regulate the interstate business of railroads has broken down," because the law of this country, "by the agency of the courts, guarantees to every man and to every corporation the management of its own business. When the Constitution says that no one shall be deprived of life, liberty and property without 'due process of law,' it means, without what *the courts say* is due process of law, ascertained through judicial inquiry. Consequently, the time will never come when a political or administrative body will be allowed to fix rates and decide that they are 'just.' Until our system of civilization disappears, what is just will be determined by a court of justice according to principles laid down by judges, and not by legislatures or their delegates."

The inhabitants of the states most nearly affected by the recent decision are in a high state of indignation and wrathful uncertainty. Governor Leedy, of Kansas, has issued an interview, with the reported approval of Chief Justice Doster, of his own Supreme Court, in which he uses language of the most unrestrained denunciation, ending: "Nobody but a slave or a knave will yield assent to the hideous distortion of meaning which Judge Harlan gives to the word 'person' as used in

<sup>1</sup> 169 U. S. 466 (1898), modified 171 U. S. 361.

<sup>2</sup> See his article, "Railroad Control in Nebraska," in the *Political Science Quarterly* for December, 1898.

<sup>3</sup> Vol. 66, p. 220.

the Fourteenth Amendment, and upon which he bottoms his infamous decision, and which shows to what depths of iniquity the Supreme Court of the United States has descended." The Review of Reviews for April, 1898, contains a more temperate expression of the Western view: "I wonder if I am mistaken in regarding the recent decision of the Supreme Court, written by Judge Harlan, on the Nebraska maximum rate law, as a more dangerous one than either the Dred Scott decision or that on the income tax? The Dartmouth College decision attempted to take corporations out from under the police (regulative) power of the state by construing franchises as contracts. This decision seems to me to rule that frauds, like watering stock, and extortions like excessive charges, committed under those charters, are also contracts. . . . There is, then, absolutely no help for the people through the exercise of their reserved powers of regulation and the inalienable right of 'police regulation.' The Supreme Court rules that corporations are persons under the meaning of the Fourteenth Amendment. The corporations have added to them what must be almost the last privilege they could hope for—that of having all the privileges of personality, but none of the responsibilities. They are persons, in the eyes of our corporation-controlled courts, who can have every possible privilege, but are never to be punished like ordinary persons. . . . This is a Dred Scott decision which says that white men have no rights that any corporation is bound to respect."

Mr. H. P. Robinson, editor of the *Railway Age*, gives almost as much scope to the decision as the men of the West, and rejoices to conclude that railway rates are now absolutely beyond control of the legislatures in all the "Granger" or "Populistic" states.<sup>1</sup>

These varying views remit us, for satisfaction, to the case itself. But, before reaching the case, the previous conditions in Nebraska demand attention. These conditions amounted to a state of war between the Nebraska legislature and the railroads.

<sup>1</sup> See Mr. Robinson's article in the *North American Review* for April, 1898.

A legislature is usually a body whose technical knowledge of railway management is of the slightest; its members, especially in a Western state like Nebraska, are apt to be innocent of bondholding or shareholding; and, looking at the matter solely from the standpoint of the land-owning and producing classes, are inclined to treat the railroad much as the early English Parliaments treated the laborers and merchants. The legislature, though representing the state, must feel weaker in wealth and material resources than the railroads it attempts to control. Mr. A. G. Warner<sup>1</sup> pointed out, eight years ago, that "in financial power . . . the railroad systems indefinitely surpass any state that their branches happen to cross." The annual revenue of Nebraska is between two and three millions; the annual earnings of the railroads running through the state are from ten to thirty millions each. "It will be seen how disproportionate is the financial strength of the antagonists, if only one of the railroads is at issue with the state on a given question; and, on a question where it is the state against all the railroads, the odds are still more in favor of the latter." Mr. Warner then proceeds to show how this financial superiority of railroads enables them to command the services of men of greater ability than the state can afford to do. The salaries of the railway officials run upwards to \$20,000, or even higher, while the highest paid state official in Nebraska receives only \$2500 a year. The present constitution, having been adopted just after the grasshopper plague, provides in every case for the lowest possible salary, and limits the legislature to a sixty days' session every two years.

The railroads all have their principal offices and over half their mileage outside the limits of the state. "Practically none of the stocks and bonds of the railroads in Nebraska are owned by Nebraskans. The owners and controlling officers of the roads are non-residents. This absenteeism increases the popular dislike of the road. It is felt that any unearned profits not only injure individuals but impoverish the community as a whole, while the representatives of the roads within the state are looked upon as mere hirelings, owing to the

<sup>1</sup> "Railroad Problems in the West," VI Pol. Sc. Q. 66, March, 1891.

companies duties, which are inconsistent with good citizenship."

The mileage of the Nebraska roads increased from 305 in 1866 to 1100 in 1875, and to 5500 in 1893. The growing importance of the railways caused the constitution of 1875 to empower the legislature to fix maximum charges, to prevent discrimination, and to enforce its mandates by forfeiture if necessary. The Act of February 2, 1881, was passed "to prevent discrimination," and provided that the rates should not be higher than the published rates of November 1, 1880, which were the lowest up to that time. A Railroad Commission was created by the Act of March 5, 1885 (Laws, ch. 65). This was changed by the Act of March 31, 1887 (Laws, ch. 60), to the "Board of Transportation," composed of five state officers and three other members appointed by the former. Upon these latter, of course, fell most of the work. The powers given this board were almost identical with those exercised by the English "Board of Trade."<sup>1</sup> The principal difference is that the orders of the English Board of Trade are "confirmed" in each case by a special act of Parliament, while those of the Nebraska Board were enforced by mandamus from the State Supreme Court. Thus, in the year of the passage of this act, the Fremont, Elkhorn and Missouri Valley Railroad refused to conform to an order of the Board reducing its rates  $33\frac{1}{3}$  per cent. This order the Supreme Court enforced by mandamus in *State ex rel. Board of Transportation v. Fremont, E. & M. V. R. Co.*<sup>2</sup> But the actions of the Board of Transportation did not satisfy the farmers, who constituted the bulk of the Nebraska population. According to Mr. Warner's article<sup>3</sup> the politicians publicly opposed the railroads, but secretly were "influenced" to subservience. "The language and the actions of the politicians" were so inconsistent that the people became enraged beyond endurance. The result of the ensuing campaign was the law of April 12, 1893, an act "to regulate railroads, to classify freights, to fix

<sup>1</sup> See *infra*.

<sup>2</sup> 22 Neb. 313, S. C., 35 N. W. 118 (1887). Opinion by Maxwell, C. J.

<sup>3</sup> *Supra*.

reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act.”<sup>1</sup> Section 5 of the statute provided that if any railroad in the state should believe the schedule of rates prescribed by the act to be unjust and unreasonable, opportunity should be given for such railroad to bring action in the Supreme Court of the state against the State of Nebraska; “and upon a hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, (it) may issue their (its) order directing the Board of Transportation to permit such railroad to raise its rates to any sum in the discretion of the Board,” provided the new tariff did not exceed that in force January 1, 1893. This law was to go into effect August 1, 1893. Proceedings to test the law were begun July 28, 1893, and complainants obtained from the United States Circuit Court a decree enjoining all enforcement of the act, which was finally passed upon by the Supreme Court March 7, 1898, nearly five years after its passage. Brewer, J., said in the Circuit Court at Omaha: <sup>2</sup> “If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is *prima facie*, at least, equally unreasonable to so reduce any single fractional part of such earnings;” and the learned justice, following this argument, found the *prima facies* confirmed by the elaborate tables and schedules submitted to him, and made the preliminary injunction permanent. Dundy, J., concurred. From this it is to be inferred that an unreasonable rate, *prima facie*, is one which reduces compensation. The converse would follow, that a reasonable rate is one increasing, or not decreasing, the income of the carrier. The opinion of Mr. Justice Harlan in the Supreme Court is much to the same effect. This question,

### 1. What is a Reasonable Rate?

was pronounced by Judge Cooley, in his address to the Con-

<sup>1</sup> Acts of Nebraska, 1893, ch. 24, p. 164; compiled Statutes of Nebraska (8th Ed.), 1897, c. 72, art. 12, p. 819.

<sup>2</sup> 64 Fed. 165 (1894).

vention of Railroad Commissioners, March 3, 1891, at Washington, to be *the* railroad problem. It seems to be one almost baffling solution. Said Railroad Commissioner Becker, of Minnesota, addressing the Fifth Annual Convention of Railroad Commissioners in 1893, "I have never seen yet an answer to the question, What is a reasonable rate?"<sup>1</sup>

#### 1. The Railway View.

The argument is sometimes made that "the market value of the service," or "what the traffic will bear," is the only reasonable rate. It is asserted that the utmost possible charge for transportation is limited to the difference between the cost of the commodity at the place of production, and its price at the terminus of the road. Elaborate arguments are made to show how competition between the shipper and carrier for the margin of profit which lies in this difference, will gradually result in a compromise, satisfactory to neither party, perhaps, but still infinitely preferable to any rate arbitrarily fixed by an outside body.<sup>2</sup> The argument is plausible, and the reasoning of a kind that falls in with traditional American ideas of personal independence. But the statement that the carrier's charge is limited to the difference between the cost of the article at one point and its selling price at the other, ignores the fact that this very selling price is determined by the average cost of production of the commodity plus the average of the transportation charges to the market, and is thus a *pctitio principii*. The view of the question from this latter standpoint convinces many that if the railway is uncontrolled by law, "it can levy what tribute it pleases, direct the channels

<sup>1</sup> Mr. H. R. Shorter, State Railroad Commissioner of Alabama, said at Washington, in May, 1895 (see report Seventh Annual Convention Railroad Commissioners, p. 35), "For the past ten years, in an official way, I have wrestled with these two questions—the value of a railroad and a reasonable rate. I never found, during my experience as a Railroad Commissioner, what was a reasonable rate until I got that information from the distinguished former chairman of the Interstate Commerce Commission in this room several years ago, when he said to me that he believed, as the result of his observation, that a reasonable rate was one under which a trader thought he had some little advantage of his adversary."

<sup>2</sup> "Railroad Stockwatering," by Thomas L. Greene, VI Pol. Sc. Q. 474.

of trade and the tides of business, make and unmake cities, build up and put down industries, enrich and impoverish individuals and communities. . . . 'The state must control the railways or the railways will control the state.'"<sup>1</sup>

## 2. The "Public" View.

So conservative a jurist as the late Justice Cooley declared that "So long as five hundred bodies of men in the country are at liberty to make rate sheets at pleasure, and to unmake or cut and re-cut them in every direction at their own unlimited discretion, or want of discretion, and with little restraint on the part of the law, except as it imposes a few days delay in putting changes in force, the problem will remain to trouble us; the mere existence of the power, making losses, disorder and confusion constantly imminent. The authority to reduce rates when they are found to be excessive is but a slight corrective. . . ."<sup>2</sup>

Railroad Commissioner Becker, of Minnesota, said further, ". . . the expense which a railroad company is at to carry the freight, or to manage its business affairs, is a matter which does not enter at all into the question of what is a reasonable rate. . . . When we consider the question of a reasonable rate, we look at it from the railroad standpoint, not from the standpoint of the shipper, and we are apt to forget the interest of the shipper. . . . I don't believe the railroads will be justified in demanding a rate which will crush out the industries of the country. . . . I object most strenuously, as a citizen, against any form of authority which undertakes to say that the people of this country are bound forever to pay the interest upon the bonds of any railroad company by freight tariffs, or the dividend upon any stock by freight tariffs. . . ."<sup>3</sup>

The "public" view thus defines a reasonable rate as *that*

<sup>1</sup> Report Com. on Reasonable Rates, Fourth Annual Convention Railroad Commissioners.

<sup>2</sup> Address of Hon. Thomas M. Cooley, Chairman, to the Convention of Railroad Commissioners, report of Third Annual Convention, page 31.

<sup>3</sup> Address to the Fifth Annual Convention of Railroad Commissioners, at Washington, 1893.



*which is reasonable for the people to pay, not what is reasonable for the carrier to receive.*<sup>1</sup>

What may be characterized as

### 3. The "Judicial" View

occupies a position somewhere between these two extremes and will most clearly appear in the discussion of

### 2. *The Means for Determining a "Reasonable Rate."*

Mr. Justice Harlan declares<sup>2</sup> that in order to determine whether any given rates are, or are not, such as to allow the carrier reasonable compensation, the basis of calculation must be "the fair value of the property" used by the corporation. "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, *the amount and market value of its bonds and stock* (italics mine), the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

Also, ". . . the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the business of an interstate character done by the carrier, or to the profits derived from that busi-

<sup>1</sup> This definition receives support in *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas. (P. C.) 723 (1883), in which the question arose of what was a reasonable rate of toll over a public bridge. Complaint had been made that the tolls were unreasonably high, because resulting in an enormously large profit to the bridge company, but the court held that the profits made by the company were to be absolutely disregarded, the sole criterion being the reasonableness from the standpoint of the public. The tolls being reasonable, viewed in that light, they could stand, though the company obtained fabulous returns. "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged." (P. 371.)

<sup>2</sup> *Smyth v. Ames*, 169 U. S. 466, at p. 546-7.

ness.”<sup>1</sup> Or, as this part of the decision is explained by Mr. Robinson, “the rates imposed in Nebraska by the state legislature must be such as will give a fair return on the railway properties *inside the State of Nebraska*, measured by the volume of business *in Nebraska*. A railway company, say the Burlington road, cannot be compelled to do Nebraska business at unprofitable figures, on the ground that its lines in, perhaps, Illinois, are so profitable that the company, as a whole, will still make money.”<sup>2</sup>

<sup>1</sup> *Smyth v. Ames, supra*, at p. 541.

<sup>2</sup> See article in N. A. Rev., April, 1898. It appears from this article that on the average a railroad costs for operating at least seventy per cent. of its gross earnings. Mr. Robinson has calculated the earnings per mile for the railroads in each of twenty-eight states, together with the amount of capital upon which the net income of these roads will pay interest at the rate of six per cent. The table follows :

State.	Gross Earnings per mile.	30 per cent. of gross earnings.	Being 6 per cent. upon :
North Carolina.....	\$2,864	\$859	\$14,320
South Carolina.....	3,125	937	15,620
North Dakota. ....	3,419	1,025	17,090
Georgia.....	3,484	1,045	17,420
Nebraska.....	3,487	1,046	17,433
Texas .....	3,742	1,122	18,710
Alabama.....	7,781	1,134	18,900
Michigan.....	3,835	1,150	19,170
Kansas .....	4,482	1,344	22,610
Missouri.....	4,768	1,430	23,860
Iowa.....	4,792	1,437	23,960
Wisconsin.....	5,346	1,603	26,730
Maine.....	5,446	1,633	27,230
Kentucky .....	6,003	1,800	30,010
Virginia.....	6,393	1,902	31,710
Minnesota.....	6,592	1,977	32,960
Illinois.....	6,806	2,041	34,030
California .....	8,199	2,459	40,990
Ohio.....	8,363	2,508	41,610
Massachusetts.....	10,118	3,035	50,590
New Hampshire.....	11,361	3,408	56,800
New York.....	13,787	4,136	68,930
Pennsylvania.....	15,103	4,530	75,510
Connecticut.....	15,698	4,709	78,490
Rhode Island.....	16,223	4,866	81,110
New Jersey.....	18,777	5,633	93,880
Vermont.....	18,932	5,679	94,660

From this table, Mr. Robinson draws the conclusion that “the recent decision places an absolute veto in the way of any legislation in any one of twenty-six states (the twenty-six consist of the eleven in the above table, which have not business enough to produce a profit on railway operation, together with fifteen other states for which the figures are not available, but which, as Mr. Robinson says, ‘undoubtedly fall

### 3. *Whose Determination Shall be Final?*

This question is decisively met and answered. "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry." . . . "The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is inconsistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. *This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare*

*in the same category,')* which will reduce rates or cut down earnings. In each and every one of them, no law which by any amount, however small, *adds to the burdens of the railway companies*, can be constitutional." To these states are to be added, twelve states in which the railroads can make only a "fair profit," under present conditions, and accordingly, "the railway companies will have no difficulty whatever in showing any such (restrictive) legislation to be plainly confiscatory and unconstitutional." There are left in the entire Union only eight states whose roads have an average earning capacity of \$10,000 and upward, and in which alone restrictive legislation under the Nebraska Decision would be constitutional; and these are states with little disposition to trouble the railway rates.

We thus have the authority of one of the railway experts of America for the startling proposition that the Nebraska Freight Tax Decision absolutely forbids, as long as the conditions under which it was delivered continue, any government restriction of transportation charges in thirty-eight states of the Union. If such government regulation is a desirable thing, the conclusion thus reached might perhaps lead us to doubt, with deference, the wisdom of the action of the Supreme Court

*null and void all legislation that is clearly repugnant to the supreme law of the land.*<sup>1</sup>

4. *What Amounts to a "Taking" of Property "Without Due Process of Law?"*

The answer to this has already been foreshadowed. "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it *and to the public* (italics mine), would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States."<sup>2</sup>

Does the case decide anything new? It seems to the writer that it certainly does. Its adjudications on several points are either entirely novel or else presented with a strength and positiveness hitherto unknown.

(1) The definition of a reasonable rate was before unsettled, and still is so. But now we know that the primary ingredient is *reasonableness from the standpoint of the return to the carrier*, other considerations, such as the interests of the public, being placed subordinate to the former.

(2) So clear an enumeration of the means for determining a reasonable rate had never before been attempted. It is very novel, in two points particularly, (a) in calculating the rate by the "market value of the stocks and bonds," and (b) in the entire exclusion of interstate business from the elements entering into the determination of the intra-state rate.

(3) The question, whose determination shall be final, has at last received an authoritative answer. As matters now stand, the final determination of the reasonableness of any rate assessed by public authority upon a business in which the public is specially interested rests with the Federal Courts, provided only some stockholder in the corporation is a citizen of a

<sup>1</sup> *Smyth v. Ames, supra*, at p. 526.

<sup>2</sup> *Ib.* p. 526.

state other than that of the charter, a nearly invariable circumstance.

(4) No positive and authoritative statement had been previously enunciated that a rate, if "unreasonable," on that account necessarily "takes" property "without due process of law."<sup>1</sup>

<sup>1</sup> Another entirely novel conclusion is embodied in the following language of the opinion in the Nebraska Freight Case (see pp. 549, 550): . . . "But it may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. In anticipation, perhaps, of such a change of circumstances, and the exceptional character of the litigation, the Circuit Court wisely provided in its final decree that the defendants, members of the Board of Transportation, might, 'when the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid,' apply to the court, by bill or otherwise as they might be advised, for a further order in that behalf. Of this provision of the final decree the State Board of Transportation, if so advised, can avail itself. In that event, if the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute." Accordingly the decree of the court was modified in 171 U. S. 361.

It appears from this that an act may be unconstitutional this year, but constitutional next year, if increase of business or reduction of expenses brings greater prosperity to the railroads. Conceivably an act might be unconstitutional January 1st, and constitutional February 1st; void to-day, but good to-morrow. In like manner an act constitutional on the day it becomes law may come to be unconstitutional by operation of nothing more than lapse of time, weeks or months or years. Under this decision we might have laws valid up to the 1st of January, 1898, invalid for six months or a year thereafter, perhaps after this interregnum to take on a new lease of validity. If a law is constitutional when passed, and the railroad officials know that it will become void if the net earnings are reduced by its operation, will there not be the strongest incentive to make such reduction appear? and when the railroad attorney appears before the Circuit Court for a temporary injunction, the court, to give a decision with an approximation to fairness, must go into the question of whether or not the railway expenses are legitimate—whether the officers are not too numerous or too highly paid. On this hypothesis the prospect before our already overworked Federal Courts is anything but

It has been urged, in opposition to the court's conclusion, that a "basis of all calculations as to the reasonableness of rates," which consists in part of "the market value of the bonds and stock" (see opinion quoted above), involves reasoning in a circle, a begging of the question, because such market value depends upon an earning capacity determined by the rates charged—the very thing it is proposed to restrict. By the method of calculating used in the opinion, evidently a statute might be constitutional for one road and unconstitutional for another. Or, if the court should favor uniformity of rates for parallel roads, the wonder arises what rates the legislature *can* prescribe, since any imaginable tariff must necessarily fail to give a net profit to some road; and one road on the verge of bankruptcy might secure the privilege of high rates for all the wealthier railways running parallel with it.

Again it has been declared that, in entirely excluding interstate transportation from consideration in computing the rate within the state, the court has adopted a more conservative method of estimate than the railroads themselves. Freight charges to grain elevator centres, and to cities engaged in the pork and beef-packing industries, are often voluntarily placed by the roads at a rate which would result in a dead loss, if it were not for the interstate business thus stimulated.<sup>1</sup>

It will be seen that there appears in this case a novelty, both of expression and of substance, almost unheralded in previous decisions. Various expressions, which might be applied to the circumstances of the Nebraska case, had been used in other cases, but few of these were more than *dicta*. In *Munn v. Illinois*<sup>2</sup> it was said that "down to the Fourteenth

cheerful. Moreover, the cases would invariably be appealed from the Circuit Courts to the Supreme Court, and the decision reached by that body, after lengthy and laborious examination of all the details of business management and the lapse of several years, would be valueless as applying to the circumstances which existed at the time the case arose.

<sup>1</sup> I am indebted to Mr. Emory R. Johnson, of the Wharton School of the University of Pennsylvania, for the attitude of political economists on this and kindred points.

<sup>2</sup> P. 125.

Amendment it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. *Under some circumstances they may, but not under all.*" But against this may be placed the Chief Justice's further language :<sup>1</sup> " . . . it has been customary, from time immemorial, for the legislature to declare what shall be a reasonable compensation . . . we know that this is a power which may be abused, but that is no argument against its existence. *For protection against abuses by legislatures the people must resort to the polls, not to the courts.*" In the Railroad Commission cases<sup>2</sup> Waite, C. J., said : " From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward ; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." It should be noted here that Chief Justice Waite's language, as quoted, might have been followed out literally by the courts without leading them to the extremes to which they have gone. The statement that "the state cannot require a railroad corporation to carry . . . without reward," may, perhaps, furnish an indication of what the learned justice meant by the rest of his sentence. The Chief Justice went on to show that no such question was then at issue, and the case was decided in favor of the constitutionality of the statute.

Mr. Justice Harlan quotes from *St. Louis, Etc., R. v. Gill*,<sup>3</sup> in which it was said that there is a remedy in the courts against legislation so unreasonable as practically to destroy the value of property, and that the question is a judicial one. But in this case the constitutionality of the statute of Arkansas was upheld. The case of *Covington, Etc., Turnpike Co. v.*

<sup>1</sup> P. 133.

<sup>2</sup> 116 U. S. 307, 331.

<sup>3</sup> 156 U. S. 649, 657 (1894).



*Sanford*<sup>1</sup> supports in its language the Nebraska Freight case, but no actual determination as to reasonableness of rates was made. The cause was remanded for further proceedings.

The state courts, of course, have taken a more lenient view of the legislative power. *Dillon v. R.*<sup>2</sup> says . . . "the reasonable regulation of a business . . . affected with a public interest is not a taking of property without due process of law. We cannot, therefore, judicially determine . . . that the provisions of the act are unreasonable . . . The unreasonableness of the provisions is to be determined as a question of fact," citing *R. v. Wellman*,<sup>3</sup> where Mr. Justice Brewer asks "must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect; and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law, in its application to a particular company, depends upon a question of fact as to its effect upon the earnings, may not the court properly *leave that question to the jury* and decline to assume that the effect is as claimed? There can be but one answer to these questions."<sup>4</sup> *Winchester, Etc., Turnpike Co.*

<sup>1</sup> 164 U. S. 578, 584, 594-5, 597 (1896).

<sup>2</sup> S. C. of N. Y., 43 N. Y. Suppl. 320, 328 (1897).

<sup>3</sup> 143 U. S. 339 at 343 (1892).

<sup>4</sup> The idea that the reasonableness of a rate is a question of fact and not of law is favored in *Palmer v. London & S. W. R., L. R. 1 C. P. 593* (1866); *Diphwys Casson Slate Co. v. Festiniog Ry. Co., 2 Ry. & Can. Traf. Cas. 73* (1874); *Denaby Co. v. Manchester, Etc., R., 3 Ry. & Can. Traf. Cas. 426* (1880); S. C., 11 App. Cas. 97, and *Phipps v. London & N. W. R., 2 Q. B. D. 229, 236* (1892). These cases deal with the question of "undue preference" as making the rate unreasonable. On the other hand, in *Tobin v. London & N. W. Ry. Co., [1895] 2 Ir. R. 22 (Q. B. D.)*, it is said: "Juries would, of course, take different views, according to the train service of their locality; and, if the management of good traffic depended on their decision, it would become a chaos, resulting in the ruin of the company under an avalanche of litigation." This language refers particularly to the reasonableness of time schedules, but might apply as well to rates.

v. *Croxton*<sup>1</sup> has this language: "Admittedly the rate fixed is reasonable—the *legislative will so declares*—but what is reserved? What is it that the public is interested in reserving? Manifestly that the rate should *continue* reasonable, and what was to be deemed reasonable in the future the *legislature* was to decide, whenever it chose to act."

But the legislative discretion as to reasonableness has now become so straitly circumscribed by the Federal courts, that we may expect their lead to be followed by the courts of the states; and, unless a decided change comes in judicial opinion generally, few such instances as that just cited from Kentucky can be noted anywhere. Mr. Justice Brewer's suggestion that the question is one of fact for the jury seems to have met little favor, although the reasons he adduces are weighty. It is true, however, that a jury's verdict on such matters might be very uncertain and inclined against the railway irrespective of the facts, and the facts are usually presented in the form of tables and intricate calculations very puzzling to the layman. Indeed, even the judge seems not particularly fitted for technical problems of railway construction and management. *Prima facie* the proper authority for the adjudication of such questions would be a body composed of persons especially trained in railway affairs. If rates must be fixed by any one other than the officials of the railway company, a commission of experts certainly would seem, theoretically at least, the ideal body for assessment of the charges. Mr. Justice Harlan himself says: "What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive? . . . Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies (qualify) them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink, etc."<sup>2</sup>

<sup>1</sup> 98 Ky. 739 (1896).

<sup>2</sup> Opinion Nebraska Freight Case, *supra*, at p. 527.

It will be remembered that the early Vermont Act of 1849 provided that its Supreme Court, on petition of ten freeholders, should alter or reduce rates as they should deem expedient. This provision (which is believed to be unique among statutes of this kind) is still substantially in force: "The Supreme Court, at any term thereof, on application in writing of three or more freeholders of the state . . . may from time to time . . . alter or reduce the toll of any railroad operated in this state."<sup>1</sup> This expressly makes the court a commission for fixing rates. But commissions have usually consisted of persons specially appointed for that purpose.

The New Hampshire law provides for a Board of Railroad Commissioners consisting of three persons. "No person who owns railroad stock, or who is employed by a railroad corporation, or who is otherwise interested in one, shall be eligible to the office. No more than two members shall be appointed from one political party." The members of the commission are appointed by the Governor. "The expenses of the Board, including the salaries of its members, shall be borne by the railroad corporations in proportion to their gross receipts." . . . "The Commissioners shall fix the maximum charges to be made by the proprietors of railroads with the state for the transportation of persons and freight, and shall change the same from time to time as the public good shall require, subject to existing limitations. The rates so fixed shall be binding upon the proprietors."<sup>2</sup> Thirty-two states<sup>3</sup> have commissions similar to that of New Hampshire. Not all, however, have the privilege of changing rates.

<sup>1</sup> See Vermont Statutes of 1894, p. 696, secs. 3896 and 3897.

<sup>2</sup> Public Statutes of New Hampshire, pp. 428, 429, 430 (1891).

<sup>3</sup> These states include Alabama, Arkansas, California, Connecticut, Colorado, Georgia, Illinois (warehouses also), Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota (warehouses), Mississippi, Missouri (warehouses), Nebraska (railroads, telegraphs, telephones, express companies, warehouses), New Hampshire, New York, North Carolina, North Dakota, Ohio (railroads and telegraphs), Oregon, Pennsylvania, (Department of Internal Affairs), South Carolina, South Dakota, Texas, Vermont (it is expressly provided that the Acts of the Vermont Commissioners shall not "impair the rights or duties of the railroads." As already stated, the rate-making power is in the Supreme Court), Virginia, Wisconsin.

The fact that so many states have established bodies like those described, and the high opinion entertained of them by the United States Supreme Court, would seem to point to greater success in rate-making by commissions than in that by direct legislative action, such as was considered in the Nebraska case. On the other hand, it might possibly be anticipated that the courts would be jealous of the powers and jurisdiction of the newly-established commissions, as the old judges of the common law were of the admiralty and equity courts. The latter anticipation has proved correct. The experience of one state will illustrate the general attitude the courts have adopted toward the railroad commissions.

In 1887 the State of Florida established a railroad commission<sup>1</sup> with powers similar to those of the Board of Trade under the English Railway and Canal Traffic Act. In an action brought by the state<sup>2</sup> to recover penalties alleged to have been incurred under the Railroad Commission Acts, the railroad pleaded "that it could not pay the expenses of operating its road by charging for transportation of persons and things the rates fixed for it by the railroad commissioners, or by charging less rates than those charged by it to the passenger named." To this plea the state demurred. The Supreme Court declared that "the legal proposition asserted by the Circuit Court in sustaining the demurrer to this plea is that the state may, through the instrumentality of the commissioners, prescribe and may enforce through the courts, passenger and freight tariffs which do not pay the railroad company the expenses of operating its road; that the judgment or discretion of the commissioners is conclusive as to the reasonableness of the rates as against the interference of the courts or any other power, except it may be the legislature.

. . . The commissioners say the company must not charge more than three cents, although it will compel a loss of money, and the company says it cannot pay operating expenses at the rates of freight and passenger charges pre-

<sup>1</sup> See Revised Stats. of Florida, 1892, p. 746, §§ 2287 and 2288.

<sup>2</sup> Pensacola, etc., R. v. State, 25 Fla. 310, 3 L. R. A. 661, Raney, C. J., 1889.

scribed by the commissioners, or without charging  $4\frac{1}{8}$  cents per mile. Our opinion is that the action of the commissioners in prohibiting the larger rate is a palpable abuse of their discretion and a trespass upon the rights of the company, and one which, if enforced with the freight rates prescribed, would amount in law and in fact to taking the property of the company without just compensation. It is not a reasonable rate, considered either with reference to the interests of the people or those of the railroad company, or both."

The attitude of the court seems unfavorable. The statute creating the commission is strictly construed against that commission's powers, and the court shows no disposition to allow the business before the commissioners to get beyond judicial reach. The result of the condition of things in Florida was the repeal of all the Railroad Commission Acts.<sup>1</sup>

*Railroad Commission v. R.*<sup>2</sup> likewise held that "whether the rules and regulations of the railroad commission are reasonable or not, is a question of law for the court." The finding of the court in this case, however, was favorable to the commission.

The United States Supreme Court had declared in the Railroad Commission Cases<sup>3</sup> that a Board of Commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. But in the Minnesota cases,<sup>4</sup> the Minnesota Railroad Commission Act was declared unconstitutional because the act provided that the rates recommended by the commission should be "final and conclusive as to what are equal and reasonable charges." The courts were not allowed to interfere. "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, *if it chooses to establish rates that are unequal and unreasonable.*"<sup>5</sup> Thus it

<sup>1</sup> Revised Statutes of Florida, 1892. Appendix. Chap. 4068.

<sup>2</sup> 40 S. W. 526 (Court of Civil Appeals of Texas, April 28, 1897).

<sup>3</sup> 116 U. S. 307 (1886).

<sup>4</sup> 134 U. S. 418 (1890).

<sup>5</sup> Following this decision, *Southern Pacific Company v. Board of R. R. Com.*, 78 Fed. 236 (C. C. N. D. Cal., 1896), held that the functions of a

appears that both Federal and State Courts refuse to recognize the standing of State Railroad Commissions. Naturally the commissioners have chafed under this restraint of the courts. The State Railroad Commissioners, at their annual conventions at Washington, have expressed very frankly their opinions in the matter.<sup>1</sup>

The condition of the Interstate Commerce Commissioners has been no better than that of the state officials. When questions that had been investigated by the commissioners were brought to the attention of the courts, they refused to attach weight to the laborious findings the commissioners had made. Chairman William R. Morrison, of the Interstate Commission, said, in 1892,<sup>2</sup> "When an investigation has been made, involving vast expense, witnesses summoned from different parts of the country, or, if you please, when the commissioners have gone to the localities, and made investigation, and reached a conclusion, it (they) must go to the courts to enforce the orders made on the conclusion arrived at, and as the law now stands, the court, before it undertakes to enforce orders, undertakes to ascertain whether they are lawful orders in a new trial and investigation. After we have investigated questions, made orders, and reached conclusions, necessarily at great expense, and then go into court and ask the enforcement of our orders, the roads respond and make an entirely new case and call new witnesses. . . ." Commissioner

railroad commission "are not so purely legislative that it is not amenable to the control of the courts, when it attempts to enforce a tariff of rates which is unjust and unreasonable, . . . and that, while a state has power to regulate railroad rates, such power, as well as the right of a railroad company to control its business, stops at injustice, the state having no right to fix a rate unreasonably low, though it may prevent a railroad from fixing one unreasonably high." A provision of the California Constitution making the rates fixed by the commission conclusively just and reasonable was pronounced void as in conflict with the Fourteenth Amendment. This case occupies about forty pages, a large part of which consists of columns of figures and arithmetical computations of receipts and expenditures, rendered necessary by the investigation into the railroad business such cases always entail.

<sup>1</sup> See Reports of the Conventions.

<sup>2</sup> Report Fourth Annual Convention R. R. Com., April, 1892, pp. 123, 136.

Veazey said at the same time, "Under the construction which two or three Federal courts of the country have given this act, they have made it in this respect (as to speedy and economical remedy) a delusion and a snare. It does not operate as a speedy, expeditious and economical remedy to the complainant in any instance when the railroad company sees fit not to obey the order of the commission. . . . The trouble was that in this new trial before the courts the witnesses had to be called in from all over the country, and the complainant had to bring in his witnesses all over again, . . . Under this construction of the act adopted by the courts the railroad company does not feel obliged to bring any more evidence before us than it feels disposed to offer . . . and relies on the prospect of a new trial when it can bring in what witnesses it chooses. . . . If the Interstate Commerce Commission is composed of men such as they ought to be, it may be assumed that they are as capable of getting at the truth of the matter involving transportation charges, or like subjects, as any one inexperienced man, however able he may be. That is all there is of this question. . . ."

Mr. Allen Fort, Chairman of the Seventh Annual Convention of Railroad Commissioners, in his address to the Convention, May, 1895,<sup>1</sup> declared, "I concede, of course, with the greatest respect, that it must be the observation of all that nearly all of our appeals to the courts have not met with that kind of assistance which we had reason to hope or expect. The conservatism of the courts, if you please, has been an obstruction to efficient and prompt railway regulation. Let us hope that it will not always be so, but that there will be that harmony between these tribunals and the courts and the railroads that will remove the difficulty, that will secure even and exact justice to the public, and at the same time, and under any and all circumstances even and exact justice to the railroads."

Mr. H. C. Adams, Statistician of the Interstate Commerce Commission, says: "Had it been possible for the courts to accept the spirit of the act (creating the commission), and to

<sup>1</sup> Report p. 9.



render their assistance heartily and without reserve, there is reason to believe that the pernicious discrimination in railway service and the unjust charges for transportation would now be in large measure things of the past. As it is, the most significant chapter in the history of the commission pertains to its persistent endeavors to work out some *modus vivendi* without disturbing the dignity of the judiciary. . . . Had the courts been willing to grant the law the interpretation that Congress assumed for it when it was passed, the railway problem would by this time have approached more nearly its final solution.<sup>1</sup> Mr. Adams, in the same article, sums up the matter as follows: "What conclusion is warranted by this rapid review of ten years' experience with the Federal acts to regulate commerce? . . . The record of the Interstate Commerce Commission during the past ten years, as it bears upon the theory of public control over monopolistic industries, through the agencies of commissions, cannot be accepted as in any sense final. It may ultimately prove to be the case, as Ulrich declares, that there is no compromise between public ownership and management on the one hand, and private ownership and management on the other; but no one has no right to quote the ten years' experience of the Interstate Commerce Commission in support of such a declaration. This is true, because the law itself scarcely proceeded beyond the limit of suggesting certain principles and indicating certain processes, and Congress has not, by the amendments passed since 1887, shown much solicitude respecting the efficiency of the act. It is true, also, because the courts have thought it necessary to deny certain authorities claimed by the commission, and again Congress has not shown itself jealous for the dignity of the administrative body which it created; and, finally, it is true, because the duty of administering the act was imposed upon the commission without adequate provision in the way of administrative machinery, and ten years is too short a time to create that machinery, when every step is to be contested by all the processes known to corporation lawyers. For the

<sup>1</sup> "A Decade of Federal Railway Regulation," By Henry C. Adams, Atl. Monthly, April, 1898.

public the case stands where it stood ten years ago. Now, as then, it is necessary to decide on the basis of theory, and in the light of social, political and industrial consideration, rather than on the basis of a satisfactory test, whether the railways shall be controlled by the government, without being owned or controlled through governmental ownership. The danger is that the country will drift into an answer of this question without an appreciation of its tremendous significance."

In the case of *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R.*,<sup>1</sup> known as the "Chicago-Cincinnati Freight Bureau Case," Mr. Justice Brewer said: "The question debated is whether it (Congress) vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions,

<sup>1</sup> 167 U. S. 479 (1897). This opinion followed *Cincinnati, Etc., R. v. Interstate Commerce Commission*, 162 U. S. 184 (1896), and was affirmed by *Interst. Com. Commission v. Ala. M. Ry.*, 168 U. S. 144, 173 (1897). See, also, *Interst. Com. Commission v. Western & A. R.* 88 Fed. 186 (1898). In the "Orange Rate Case," *R. R. Com. of Fla. v. R.*, 5 Int. C. C., 13 (1891), the commission undertook to regulate rates by themselves prescribing charges which they considered reasonable. This attempt aroused great excitement and anger on the part of many people, and when the United States Supreme Court, at the same time it delivered its opinion in the *Cincinnati-Chicago Freight Bureau Case*, overruled the action of the commission (see *Savannah, F. & W. R. v. Florida Fruit Exch.*, 167 U. S. 512 [1897]), there was considerable relief. This was put into expression by Jos. Nimmo, Jr., in an article in the *Forum* in September, 1897. Mr. Nimmo said: "And now the highest court of the Federal Judiciary has repelled a similar attempt of the commission to usurp the power of determining the limits of the commercial opportunity of cities, states and sections, and of dictating the course of the commercial and industrial development of this vast country through the power of rate making." The complaint of the possible unjust operation on various localities of rates made by the commission, appears strange when one considers the present discriminations and dictations employed to build up certain sections and localities at the expense of others by private individuals for their own personal gain. The possible abuse of power by men appointed to make rates in the public interest will scarcely be likely to result in effects more disastrous.

the language by which the power is given had been so often used and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication." Mr. Justice Harlan dissented.

After viewing the breakdown of the commission plan in the United States, it will be interesting, and perhaps instructive, to observe its operation in England. The Railway and Canal Traffic Act of 1888 provided for a Board of Trade, which should have general supervision of railways and should determine, after conference with the railroad officials, upon schedules of rates. "In any case in which a railroad company fails within the time mentioned in this section to submit a classification and schedule to the Board of Trade, and also in every case in which a railway company has submitted to the Board of Trade a classification and schedule, and after hearing all parties whom the Board of Trade consider to be entitled to be heard before them, the Board of Trade are unable to come to an agreement with the railway as to the railway company's classification and schedule, *the Board of Trade shall determine the classification of traffic which, in the opinion of the Board of Trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorized applicable to such classification which would, in the opinion of the Board of Trade, be just and reasonable, and shall make a report to be submitted to Parliament, etc.*"<sup>1</sup> (Italics are mine.) In 28 L. R. Stats. P. XV, 54 & 55 Vict., A. D. 1891, I discover a number of "Public Acts of a Local Character" in the following form: "C C XIV. An Act to confirm a Provisional Order made by the Board of Trade under the Railway and Canal Traffic Act, 1888, containing the classification of Merchandise Traffic, and the 'Schedule of Maximum Rates and Charges applicable thereto of the Great Eastern Railway Company.' . . ." This act seems to be somewhat more practicable than its predecessor of King William's time.

No question can arise under the British Constitution as to

<sup>1</sup> See 25 L. R. Stats. p. 157; Acts 51 & 52 Vict., chap. 25, § 24. Amended 31 L. R. Stats. p. 180, 57 & 58 Vict., ch. 54.

the power of the Board of Trade to determine conclusively the rates which shall be reasonable, and the confirmation of Parliament seems to follow quite as a matter of course. There is never any doubt expressed about the ability of the Board to do its work properly. The respect with which the British treat the decisions of their tribunals is an object lesson for us. Observe, in contrast, the following: "If such authority (as that of making rates) had been granted to the (Interstate Commerce) Commission, it would inevitably have engendered sectional strife, resulting in serious political disturbances. The idea that the Interstate Commerce Commission is capable of performing the service of rate-making efficiently or beneficially, seems too absurd for serious consideration."<sup>1</sup> Such words as these seem to be excused by the attitude already referred to of the courts toward the commission, and by their language, in some instance, also.<sup>2</sup>

The opinion of Mr. Justice Harlan dissenting in *Int. C. C. v. Alabama M. R.* is pertinent here: "Taken in connection with other decisions . . . the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes. . . . It has been shorn, *by judicial interpretation*, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it." . . . Remembering these expressions of the learned justice, and taking them in connection with his own opinion in *Smyth v. Ames*,<sup>3</sup> it must be concluded that the Supreme Court of the United States has found itself unwilling, under present conditions, to allow effective authority to special railway bodies, either state or national.

<sup>1</sup> See article by Joseph Nimmo, Jr., in the Forum for September, 1897. Mr. Nimmo adds to the language quoted, "An experience of twenty years as an officer of the government at Washington convinces me that governmental management of the railroads is utterly incompatible with the Constitution and the methods of the administrative government of the United States."

<sup>2</sup> For example, note the sarcastic allusions to the "naïve remarks" of the Interstate Commission, in *Texas & P. R. v. Int. C. C.*, 162 U. S. 197.

<sup>3</sup> 168 U. S. 144, at p. 176 (1897), *supra*.

Judicial construction has effectually destroyed legislation intended to make rates for railroads. In the matter of government fixing of transportation charges, we seem, as Emerson says most men have done, to have "arrived with pain and sweat and fury nowhere." The same result must be reached in the case of quasi-public corporations generally. Practically all of these have shareholders in different states, so that in every case the Federal Courts would have jurisdiction. If the city, or county, or state fixes a maximum charge the defence "due process" can be raised, and an injunction obtained from the nearest circuit court.<sup>1</sup> In from two to five years, the case on appeal will be reached in the United States Supreme Court, which body will then discover a "reasonable basis of calculating" the profit of gas or electric light making, or of the telegraph or telephone business; make an investigation of the figures in the case, and finally pronounce the rates either constitutional or unconstitutional. In the meanwhile a western city will have had time to increase its population enormously, and the rates appearing on the records before the court will be ancient history long before the decision is declared. A condition which places the determination as to charges in business of a quasi-public nature all over the country, in the hands of the Supreme Court, is inconvenient to say the least. But that is the condition confronting us. Could any different result have been reached under our constitution? Possibly. An attitude a little more like that of the English, a little more fearful of extending judicial prerogatives, a little less eager to

<sup>1</sup> Cases of this kind are multiplying very fast. In *Northern P. R. v. Keyes*, 91 Fed. 47 (1898), a rate fixed by the Board of Railroad Commissioners of North Dakota (acting under ch. 115, Laws, 1897), was declared unreasonably low. In *San Diego Land & Town Co. v. Jasper*, 89 Fed. 274 (1898), irrigation rates established under the constitution and laws of California, were annulled as unreasonable and unjust. In *Milwaukee Electric R. & L. Co. v. City of Milwaukee*, 87 Fed. 577 (1898), a case referred to in the first article of the series in December, '98, the prescribing of a four cent fare for street railroads was pronounced a "taking" without due process. I see by the newspapers that a similar decision was reached the other day (May 16th) by Ricks, J., in the United States Circuit Court at Cleveland. There are many other cases of like character too numerous for collection in this note.

construe Bills of Rights and Fourteenth Amendments into sweeping denials of legislative power, might have brought us a result somewhat more satisfactory. How have the English solved the vexed question of a reasonable rate? Their definitions are no better than ours, but they know better how to decide individual cases :

(1) If a statute, say of railway incorporation, contains the word "reasonable," and no provision is made for assessment of rates, "reasonableness" is a judicial question, being a part of the interpretation of the statute. See *Pickford v. Grand Junction Ry. Co.*<sup>1</sup> So, also, under the common law requirement as to rates.

(2) Under parliamentary provisions railway and canal regulation in general is entrusted to a commission, and this body as a court—presumably as able as the *other* courts of England—decides questions of undue preference and reasonableness. See *Plymouth Inc. Chamber of Commerce v. Great W. R.*<sup>2</sup>

(3) Then the Railway and Canal Traffic Act, as has been described, vests the rate-making power in the Board of Trade. Now, accordingly, the Board of Trade, or the arbitrator appointed by it, has the *exclusive determination* of the reasonableness of a rate, as to amount, and no court can interfere. See *Manchester & N. C. Federation of Coal Traders v. Lancashire & Y. R.*<sup>3</sup>

This seems a perfectly intelligible result: "Reasonableness" a matter of law for a common law court, when it depends solely on statutory construction; a mixed question of law and fact for a body of trained experts, called railroad commissioners, when it involves "undue preference," when a decision must be rendered on what might be termed "relative reasonableness;" a matter of administration for the Board of Trade when the amount must be decided as a question of "absolute reasonableness."

Of course, the Federal character of our government renders so simple a result impossible here, and yet it is quite

<sup>1</sup> 10 M. & W. 399 (1842).

<sup>2</sup> 9 Ry. & Can. Traf. Cas. 72 (1895).

<sup>3</sup> 76 L. T. 786 (1897).

conceivable that a working plan could have been arranged, with a division of jurisdiction and responsibility between the State and Federal commissions. The question of restraint of the too radical zeal of "Populistic" commissions in rural states comes in also, and has furnished perhaps the best apparent excuse for the judicial legislation that has landed us where we are. But it seems certain that the harm done by these "radicals" could not have been as great as that often accomplished in shorter time by skillful railroad "wreckers," under forms of law, and with evil results outlasting those wrought by ill-considered governmental interference. But it is of no use to regret the past action of our courts. We have before us their handiwork, and the question now is the untangling of the difficulty. Nothing seems more promising to the writer than the plan recommended by the Interstate Commerce Commission :

(1) Congress should grant the rate-making power, in certain cases, to the commission.

(2) The review of the commission's rates by the Federal courts should end with the Circuit Court of Appeals. That body's judgment, in short, should be final. By this means a speedy end could be brought to any dispute.

Similar rules adopted for state commissions, with proper expedients for correlating Federal and state control of railroads, would give us a result of more satisfactory promise than the continental system of state ownership, and perhaps almost as smooth in its working as the English plan above outlined. It is to be hoped that some definite scheme, at any rate, will soon replace the present uncertainty.

*Roy Wilson White.*



## LIENS OF THE RECEIVERSHIP OF A BUSINESS CORPORATION.—PART II.

Turning now to the state courts, we shall find a great divergence of decision. Some are quite as emphatic as the Federal courts in refusing to permit the receiver to incur indebtedness at the expense of the lien holders; others consider it a matter of right.

The matter was definitely settled in New York, as early as 1887, by the case of *Raht v. Attrill*,<sup>1</sup> an authority much relied on by Caldwell, Cir. J., in *Hanna v. State Trust Co.*<sup>2</sup> The Rockaway Beach Hotel was undertaken by a corporation which exhausted its means in the first six months, leaving the hotel far from finished. Then a receiver was appointed, who undertook to complete the work and operate the hotel with money borrowed on certificates. At one time a mob of unpaid and starving workmen became riotous and threatened to burn the building, and the referee found that they would have done so had not more money been advanced at once to pay them. Finally, a purchase money mortgage was foreclosed, and the net result of an expenditure of \$1,000,000 to improve the property was a fund of about \$86,000 wherewith to pay claims exceeding \$800,000. The court said "this case illustrates what I apprehend has been the common experience, where a court, departing from its appropriate judicial function, has undertaken to manage and carry on the business of a failing and insolvent corporation." The priority given the certificates, although neither the mortgage trustee nor the bondholders had been made parties to the proceedings, led to a contest over the fund. The court went as far as seemed possible towards allowing the debts of the receivership: "It has become the settled rule that expenses of realization and also certain expenses, which are called expenses of preservation, may be incurred under the order of the court on the

<sup>1</sup> 106 N. Y. 423 (1887).

<sup>2</sup> 70 Fed. 2 (1895), (C. C. of A.)

credit of the property ; and it follows, from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or, when necessary, out of the *corpus* of the property before distribution, or before the court passes over the property to those adjudged to be entitled. It is claimed that the money advanced in this case to protect the property from an incendiary burning created a debt for preservation, which may be preferred to the claim of the bondholders. We are of a contrary opinion." It was the duty of the state to suppress riot and protect property, rather than of a receiver to buy his peace. The conclusion is accordingly reached : " It would be unwise, we think, to extend the power of the court, in dealing with property in the hands of receivers, to the practical subversion or destruction of vested interests, as would be the case in this instance if the order of August 17th should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained, and that a rigid rather than a liberal construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted."

The case of *Farmers' Loan & Trust Co. v. Bankers & Merchants' Telegraph Company*<sup>1</sup> deserves notice, for the business continued by the receiver was that of an important telegraph company. Priority over the mortgage bonds was sought by a creditor for advances made to the company just before the receivership. This, it will be remembered, involves an extension of the general principle invoked, that can be sanctioned only if the business is to be continued by the receiver, to keep the corporation a going concern until its assets are sold. The court went so far as to say : " There is a sound equity which supports the doctrine that, when the nature of the property is such that the business to which it has been devoted cannot be discontinued without great probable loss, the court may authorize it to be continued by its officer and receiver, pending the closing up of the affairs of the insolvent corporation. Expenses incurred by a re-

<sup>1</sup> 148 N. Y. 315 (1896).

ceiver under such circumstances may be justly said to be expenses of preservation for the benefit of bondholders, or other persons entitled to share in the final distribution, which ought to be first paid." The court examined the circumstances attending these loans, and found there was no equity demanding priority; accordingly this was refused, for "the right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is *strictissimi juris*."

There seems to have been no direct decision on the subject in Pennsylvania until this year,<sup>1</sup> but two cases, just decided, merit notice. In *Gillespie v. Blair Glass Company*,<sup>2</sup> receivers were given authority to operate the glass works "with materials now on hand" and with such other materials as the court might authorize them to buy. They went beyond the scope of this order without asking permission of the court, and the operation of the plant resulted in a deficit. To make this good, the receivers asserted a claim against the fund realized by the sale of the plant, but the laborers had a statutory lien on this fund. Under these circumstances the court awarded the fund to the laborers, saying *inter alia*: "It is not necessary to inquire under what circumstances these receivers would be protected from loss by the court, since the question is not raised by the facts. . . . A chancellor will seek to protect one acting in strict compliance with his orders from loss, but one who has acted upon his own judgment has no right to expect the court to divest a clear legal right existing in others to save him from the consequences of his own unauthorized acts. The receivers had a designated fund in this case to which to look. When that fund was exhausted they knew it. If, instead of suspending the unprofitable operations, they chose to continue them and incur a considerable indebtedness which they knew they could not pay, their improper conduct gives them no claim upon the chancellor or the creditors for reimbursement. They are in the same position as other improvident debtors. The proceeds of the realty were already

<sup>1</sup> See, however, *Lewis v. Linden Steel Co.*, 183 Pa. 248 (1897).

<sup>2</sup> 189 Pa. 50 (1899).

appropriated by the law to the laborers, and were beyond the reach of the receivers."

This manifestly leaves the main question undecided, but it came up almost immediately afterwards in *Lane v. Washington Hotel Company*.<sup>1</sup> The receiver of a hotel company continued in possession of leased premises and operated the hotel under the order of the court. The landlord's application for leave to distrain for rent accruing during the receiver's possession was refused by the court, but an equivalent lien on the fund to be realized was given instead. The venture proved unprofitable, the personal property on the premises subject to distraint did not bring enough to pay the rent, and part even of this fund was claimed by the receiver to pay his commissions and counsel fee. The receiver had been appointed at the instance of the company or of its creditors. The Supreme Court disallowed these claims of the receiver, saying: "Whether there can be any sound judicial reason for continuing the business of an insolvent hotel corporation, is, to say the least, very doubtful. But, without regard to this point, there is no power in the courts in the interests of creditors and stockholders to take possession of property, operate it as a hotel and deprive the owner of any legal right." The lien given on the fund was approved, as the orderly method of procedure in view of the receiver's possession, and it was necessarily paramount to any of his claims. "He could have no other or more favorable exemption from her demand than his insolvent, the hotel company, had, nor could the court give him any. He was not receiver for her estate, but for her tenant; no insolvency of her tenant, nor action of the court in the interest of the tenant's creditors, could prejudice the landlord's right to her rent, and this right continued as long as the receiver occupied her property under the terms of the hotel company's lease. The receiver, except for this lease, would have been an intruder upon her property, even though acting by the assumed authority of the court." But the audit of the account was necessary for the adjudication of the con-

<sup>1</sup> 190 Pa. 230 (1899).

flicting claims and it was right, therefore, that the landlord should contribute to its costs.

The powers sometimes attributed to a court are illustrated in a curious way by a recent case in Georgia.<sup>1</sup> The owner of a gold mine, solvent so far as appears, sought to restrain an alleged licensee from mining. The defendant thereupon prayed for a receiver, and the court not only appointed one but directed him to work the mine. The Supreme Court, on appeal, held the appointment proper enough as regarded a quantity of ore already mined, but commented severely on the authority given the receiver: "The court seized this property, directed the receiver to go into the mining business—confessedly one of the most hazardous in which any man can engage. Suppose, as the result of his operation, he had demonstrated that there was little gold in the mine, except such as had already been taken out, and fallen far short of realizing a sufficient fund to defray the expenses of the business venture, what would have been the position of the plaintiff, who, in the first instance, appealed to the court for his protection? His mine would have been destroyed. He would have been liable to be taxed the costs of the receivership, with the probability of having the expense of this business experiment shared by an insolvent adversary. . . . Necessarily, these matters are largely within the discretion of the trial judge, but at last it becomes a question of law whether the court can lawfully embark property seized by it in an industrial enterprise, and the exercise of this power depends upon how far such conduct may be fairly necessary to the preservation of the existing status, taking into consideration the character of the property, the uses to which it may be applied, and how far, and to what extent, use may be necessary to its preservation. So far as we are enabled to do so by judicial utterance, we are disposed to discourage the practice, at the present day too prevalent in the chancery courts, of undertaking to employ the judicial machinery in the conduct of commercial and manufacturing enterprises, the control of which should be more properly committed to private hands."

<sup>1</sup> *Bigbee v. Seymour*, 28 S. E. 642 (1897).

The same conclusion was reached in *Hooper v. Central Trust Company*.<sup>1</sup> where it was sought to give priority over a vendor's lien to certificates issued for funds used to improve the property of an ice company. "It would be exceedingly dangerous," said the court, "to concede to a court of equity the power to displace, in favor of receiver's certificates, subsisting liens on the property of private corporations or of individuals." This decision was affirmed a year later in *Diamond Match Company v. Taylor*.<sup>2</sup>

Similarly, in *Vance v. Shiawassee Circuit Judge*,<sup>3</sup> the Supreme Court of Michigan modified the appointment of a receiver of a box manufacturing corporation, and set aside so much of the decree as directed him to continue the business pending the litigation.<sup>4</sup>

These are the chief authorities in the state courts deciding the question in favor of the lien-holders. Opposed to them are several in Illinois, Virginia, Alabama, Texas, and perhaps some other states. Thus in Illinois there was recently a case<sup>5</sup> analogous to *Lane v. Washington Hotel Co.*<sup>6</sup> A receiver was appointed for a hotel property, with instructions to operate it and continue the business. This resulted in loss, for which a credit was claimed out of the fund, in preference to a claim for the proceeds of furniture left in the receiver's possession. The owner, however, had assented to the use of his furniture, and the court held he was estopped. The facts, therefore, did not directly involve the power of the court to make the expenses of the receivership a charge superior to prior liens owned by persons not parties to the suit. But the court went on to discuss the question in general terms: "The object of appointing a receiver is to preserve the property for the benefit of all parties interested. Sometimes this object is best attained

<sup>1</sup> 81 Md. 559 (1895).

<sup>2</sup> 83 Md. 394 (1896).

<sup>3</sup> 60 N. W. (Mich.) 761 (1894).

<sup>4</sup> See, also, *Bushworth v. Smith*, 34 Pac. (Colo.) 482 (1893), and *Manhattan Trust Co. v. Seattle Coal and Iron Co.*, 48 Pac. (Wash.) 333 (1897).

<sup>5</sup> *Knickerbocker v. McKindley Coal Co.*, 172 Ill. 535 (1898).

<sup>6</sup> 190 Pa. 230 (1899).

by continuing a business. When this is done, the court has the right—although it should exercise such right with great caution—to make the expenses of such business chargeable upon the *corpus* of the property, if the income is not sufficient to pay the same. . . . It has been held that, although this authority of a receiver to incur indebtedness, in order to keep the business a ‘going concern’ until the rights of the parties are adjusted and a sale is effected, ordinarily arises only in cases of railroad companies; yet the same rules may be applied in other cases under like circumstances.”

The Court of Appeals had reached the same conclusion in the similar case of *Filkins v. Adams*,<sup>1</sup> where it was said the receiver of a partnership ought not to be the sufferer if the court erred in not surrendering a hotel to the lessor.

The Supreme Court, too, had already decided<sup>2</sup> that a mine could be operated to preserve leasehold interests from forfeiture; but “whether they should be kept on foot was a problem of business economy as well as of law. The jurisdiction of the court in such a case must be largely discretionary.” Continuing the business for such a purpose is by no means unreasonable, we submit, for even a considerable expense in approaching a vein of ore might well cost less in the end than the forfeiture of the lease. In fact, it is such a case as was suggested by Judge Paul in *Fidelity Ins., Tr. & S. D. Co. v. Roanoke Iron Co.*<sup>3</sup>

Another hotel case was very vigorously contested in Alabama.<sup>4</sup> A receiver was appointed at the suit of the lessor to “conduct and operate the hotel,” but the court made no order entitling him to raise money for the purpose. This, it was held, empowered him to purchase on credit, and all his debts, incurred in good faith, were ordered paid. “To prevent irreparable damage and loss, sometimes it is necessary to make provision, in cases of a going business, that the business be continued. . . . The party contracting with the receiver looks

<sup>1</sup> 60 Ill. App. 410 (1895).

<sup>2</sup> *Wilmington Star Mining Co. v. Allen*, 95 Ill. 288 (1880).

<sup>3</sup> 68 Fed. 623 (1895); see page 281, *supra*.

<sup>4</sup> *Thornton v. Highland Ave. & Belt R. R. Co.*, 94 Ala. 353 (1891); 105 Ala. 224 (1894).



to the *rem*, the fund or property *in gremio legis*, backed by a pledge of the court that it shall be liable for all costs and expenses legitimately incurred in pursuance of its order and decrees. . . . If there is an income from the property, the current expenses should be first paid out of this; but, this failing, there is no doubt that the *corpus* may be applied to such necessary expenses. . . . Under such conditions the court should never surrender its custody of the property, or discharge the receiver, until all obligations incurred by him in the proper discharge of his duties have been adjusted and provided for."<sup>1</sup> The opinion from which we quote was expressly approved when the case came a second time before the court,<sup>2</sup> and the law may be considered well settled in that state.<sup>3</sup> The authorities chiefly relied on, it should be observed, were railroad cases in the Federal courts. Yet this same court, twenty years before, had spoken very differently of the foreclosure of a railroad mortgage. "We are not aware," it was said, in a most elaborate opinion, "of any principle of law or element of wise policy which would justify such a court (of equity), after so getting possession, in laying aside its judicial character and engaging, however hopeful the scheme, in the completion of unfinished undertakings and in raising money for this purpose, as the parties themselves could not, namely, by setting up liens which shall displace other and older liens, without the consent of the persons to whom they belong."<sup>4</sup>

But it should not be overlooked that the court's intention in the hotel case<sup>5</sup> was to preserve the good-will of a going concern as an asset for the creditors. When a receiver was applied for, merely to stave off creditors and earn an income from mines and stores wherewith to pay the debts after an indefinite time, the court refused the appointment quite as positively as a Federal court might have done.<sup>6</sup>

<sup>1</sup> 94 Ala. 353 (1891).

<sup>2</sup> 105 Ala. 224 (1894).

<sup>3</sup> Cf. *Beckwith v. Carroll*, 56 Ala. 12 (1876).

<sup>4</sup> *Meyers v. Johnston*, 53 Ala. 237, 338 (1875).

<sup>5</sup> *Thornton v. Highland Ave. & Belt R. R. Co.*, 94 Ala. 353 (1891); 105 Ala. 224 (1894), *supra*.

<sup>6</sup> *Little Warrior Coal Co.*, 17 So. 118 (1895); *Etowah Mining Co. v. Wills Valley M. & M. Co.*, 17 So. (Ala.) 522 (1895).

The decisions in Virginia and Texas might, perhaps, be explained as resting on special facts, yet the opinions assert broadly a right to charge the *corpus* of the estate. In *Karn v. Rorer Iron Co.*,<sup>1</sup> the corporation's mines and furnaces were connected by a railroad, built apparently for the company's own use, and a bridge in this road was washed out. The receiver was authorized to borrow money on certificates to rebuild this bridge and make other repairs to put the property in saleable condition; he was directed also to operate the furnace. These certificates were given a lien prior to the mortgage bonds, although it would seem the property might well have been sold and the repairs and the rebuilding of the bridge left to the purchaser to undertake. Common experience shows only too often that such extensive repairs do not always enhance the value of a property to the extent of their cost, so the course pursued was likely to result in increased loss to the bondholders.

In reliance, no doubt, upon this case, a receiver was appointed for a coal company and instructed to complete its coke ovens. He was then directed to operate the plant for a year, to ascertain if the venture were profitable. His working capital was provided by an issue of receiver's certificates, to which the court gave a paramount lien. Fortunately for the other lien creditors, they had no notice of the application for these certificates. The original liens were, therefore, reinstated by the Supreme Court,<sup>2</sup> after the operation had resulted in a loss and the sale of the property did not meet the debts. But the power to issue such certificates in a proper case was again asserted—a power to be “exercised with the utmost caution, prudence and reserve,” and always with notice to the parties in interest.

In the Texas case, *Ellis v. Water Co.*,<sup>3</sup> the receiver was directed to keep the water works in operation as a going concern for the supply of a city. The receivership was at the suit of a general unsecured creditor, and the certificates, expenses

<sup>1</sup> 86 Va. 754 (1890).

<sup>2</sup> *Osborne v. Big Stone Gap Colliery Co.*, 30 S. E. (Va.) 446 (1896).

<sup>3</sup> 86 Tex. 109; 23 S. W. 858 (1893).

of administration and costs of the proceedings were charged in part on the fund in preference to existing liens. This was justified as follows :

“ While we have no doubt that the power to authorize a receiver appointed by a court of equity to create debts is liable to a great abuse, and are of the opinion that in every case it should be exercised, if at all, with extreme caution, we know of no rule or principle that would restrict the power to railway companies only. . . . The authority granted to receivers in railway cases to create debts and to make them a charge upon the *corpus* of the property of the company, is usually justified upon this ground (*i. e.*, the public duty imposed) ; and yet it seems that there may be grave doubt whether it affords a solid foundation for the doctrine. It is not clearly seen that the courts have the power to appropriate any part of the property subject to a mortgage in the interest of the public, or to impair the mortgagee's security and the obligation of their contract, in order to discharge a duty the mortgagor owes to the public. But when a court has taken the control of property from its owners and has placed it in the hands of its receiver, it is its duty so to direct its management as to preserve its value for the benefit of all parties at interest. This may be best accomplished by a continuation of the business, although such continued operation may involve the danger of some loss. . . . If the creditors of the receiver could only look to such (*i. e.*, current) revenue for the satisfaction of their claims, he would be unable to obtain credit, and the operation of the works would be impracticable. Accordingly the rule is, that the expense of administering and preserving the property is to be charged, first upon the net income, and if that be not sufficient, then upon the property itself or its proceeds upon sale. Now, while the circumstances which justify the appointment of a receiver, without authority to incur indebtedness in order to keep the property and business ‘a going concern’ until the rights of all parties can be adjusted and a sale effected, had not ordinarily arisen except in cases of railroad companies, no reason is seen why the same rules should not apply in other cases under like circumstances

. . . If the public have an interest in the continued operation of a railroad, so have they in that of water works constructed for the purpose of supplying water to the inhabitants of a city. So, also, if the property of a water company be placed in the hands of a receiver, it may be best preserved by continuing the operation of its works so as to maintain it a going concern."

We shall call attention, however, to the fact that the court's authorities do not all sustain this proposition. . Nearly all of them arose out of railroad receiverships, and the Pennsylvania case of *Neaffie's Appeal*<sup>1</sup> is mis-stated. It is true the receiver of a shipbuilding concern was in that case authorized to issue certificates to enable him to complete certain vessels, and that these certificates were paid out of the fund; but the preference thus given was only over unsecured general creditors and not over creditors with vested liens.

This is the strongest assertion the writer has found of the authority to charge the *corpus* of the property with debts incurred by the receiver in operating it. It is based on both grounds—the public need, existing in this particular case, and the general right of a court in administering the affairs of an insolvent private corporation. There was also a local statute covering the case. No attempt is made to meet the argument used in so many cases supporting the opposite view, that while it may be better for the unsecured creditors, or even for those with junior liens, to carry on the business, the creditors with superior liens have vested rights not to be disturbed without their consent. Such rights were thus disturbed in railroad receiverships, but only after a long struggle and many dissenting opinions was the rule finally established. Even in such a case, a creditor asking no favors need grant none<sup>2</sup>—a distinction the Texas court seems to have overlooked.

The conclusion to be drawn from the cases appears to be that, from the point of view of strict right, a court cannot authorize the continuance, by a receiver, of a private business at the expense of those holding vested liens. At times, however, there are considerations of public interest involved, and

<sup>1</sup> 22 W. N. C. 31 (1888).

<sup>2</sup> *Kneeland v. American Loan & Tr. Co.*, 136 U. S. 89 (1890).

it may be that in some special instances these will prevail, as they have done in the case of railroads. Thus far they have been given effect only in a very few of the State courts. The Supreme Court of the United States has yet to pass upon the question, but the other Federal courts and the State courts whose decisions are most entitled to weight have pronounced emphatically against any interference with vested liens, by continuing the business of a private corporation after a receiver has been appointed.

*Erskine Hazard Dickson.*

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ATTORNEY AND CLIENT.

The following statement from the syllabus of an opinion of the Supreme Court of Louisiana is of much wider operation than the provisions of a civil code: "Jurisprudence has settled the rule, and consecrated it, that the quantum of attorney's fees in any case where the services have been performed in the presence of the court which is called upon to decide the question is a matter of law rather than one of fact, and that it will value the same as its opinion, and sound discretion dictate rather than base its judgment upon the opinion of witnesses." *Succession of Rabasee*, 25 So. 326.

Amount of  
Attorney's  
Fees,  
Determined  
by the Court

Notice, in connection with this, Judge Sharswood's opinion in *Daly v. Maitland*, 88 Pa. 384 (affirmed *Lindley v. Ross*, 137 Pa. 633), to the effect that an even stipulation for an attorney's commission, inserted in a mortgage, is rather in the nature of a penalty than of liquidated damages, and is subject to the control and discretion of the court—not of the jury.

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#### BANKRUPTCY.

Although, of course, superseding state insolvent laws proper, it is pretty well settled that a national bankrupt law does not affect an ordinary assignment for the benefit of creditors: *Boese v. King*, 108 U. S. 379. This was followed in *State v. Superior Court of King County*, 56 Pac. (Wash.) 35, where it was held that, no bankruptcy proceedings having been instituted, the power of the State Court to appoint a receiver to wind up the affairs of an insolvent corporation was undoubted.

Effect on  
State Insol-  
vent Laws

*In re Price*, 91 Fed. 635, decides that, under § 7 (9) of the bankrupt law, the right to examine the bankrupt is not limited to any particular time, and hence the creditors were allowed to do so in order to ascertain whether there was any ground to oppose his discharge. *Quære*, whether decision would be the same if the bankrupt had already been examined.

**BANKRUPTCY (Continued).**

*Mitchell v. McClure*, 91 Fed. 621, is the first decision on what is likely to be a much disputed question, viz., How far **Jurisdiction of District Court** have the United States Courts jurisdiction under the new law of suits by receivers or trustees? This was a replevin by a receiver in the District Court to recover personal property. All parties were residents of Pennsylvania. Motion to abate the writ was granted by Bufington, D. J., on the ground that under § 23 (b) the suit should have been in the Common Pleas Court. The judge relied on *Morgan v. Thoushill*, 11 Wall. 75; *Smith v. Mason*, 14 Wall. 430, and *Maisbell v. Knox*, 16 Wall. 556; and, intimating a doubt whether any section of the present act confers jurisdiction of plenary suits upon the District Court, held that, even if the court had such jurisdiction, it was limited by § 23 (b), by the right of the defendant to remove to State Court.

**BANKS AND BANKING.**

Ordinarily a deposit in a bank makes the money deposited the property of the bank, which becomes the debtor of its depositor. Not so when the depositor is a state **Deposit in Bank, Public Money** official, who, as the bank is bound to know, has no authority to make the deposit. Although entered generally, the deposit in law is then a special one, which can be followed into the hands of the bank's receiver: *State v. Thum*, 55 Pac. (Idaho) 858.

**CONTRACTS.**

M entered into a contract with the Eastern Advertising Company, whereby the company agreed to display advertising cards of M in certain street cars for one year, the cards to be "subject to approval of the Eastern Advertising Company as to style and contents." Held, that this was a contract where skill and judgment as well as taste were required to be exercised by the advertising company, both in the designing of the cards and in selecting the type in which they were to be printed, and in the arrangement of the cards in the cars, and was, therefore, not assignable by the company: *Eastern Advertising Co. v. McGaw* (Court of Appeals of Maryland), 42 Atl. 923.

A sold land to B, representing to B that he (A) had paid a certain price for it. This statement was untrue. No confidential **Misrepresentation, Acquaintance** relations existed between A and B, but they had been acquainted with each other for several years. In an action by A against B to recover the pur-



## CONTRACTS (Continued).

chase price, B testified that A took advantage of their acquaintance and friendly relations to accomplish the sale. Held, that a direction to the jury to find for the plaintiff was error : *Dorr v. Cory* (Supreme Court of Iowa), 78 N.W. 682.

A, a workman, was injured in the service of B, and, in compromise of his claim against B for damages, an agreement **Construction,** was made between them by which B was to pay **Wages** to A regular wages while he was disabled, and also to furnish him certain supplies. Subsequently this agreement was modified by a stipulation that B should give A such work as he could do, should pay him therefor wages of \$60 per month, and later the parties entered into another contract, by which, after reciting A's claim for damages and the previous agreements, it was agreed that, in lieu of the above propositions, A's "wages from this date are to be \$65 a month," A agreeing, on his part, to release B from all claims he might have against B. In an action by A against B on this contract, held, that this was not a hiring from month to month, terminable at the pleasure of either party, but was a contract to pay A \$65 so long as his disability existed, he being bound to do such work as he could : *Pierce v. Tennessee Coal, Iron & Railroad Co.*, 19 Sup. Ct. 335.

## CRIMINAL LAW.

The question of former jeopardy was before the Supreme Court of South Dakota, in *State v. Adams*, 78 N. W. 353.

**Former Jeopardy.** The defendant was convicted of rape on a female under the age of sixteen years, and his application **Rape** for a new trial was refused ; but, inasmuch as the evidence showed that the female was over sixteen years of age at the time the offence was alleged to have been committed, the court, on its own motion, arrested the judgment and ordered the defendant to be held in custody for ten days, during which a second information was filed against him charging the same offence, with the exception that the date of the commission of the offence was earlier (in order to make its commission within the sixteen years). Held, that a plea of former jeopardy should be sustained.

## DECEDENTS' ESTATES.

*Padelford's Estate*, 42 Atl. (Pa) 287, settles a point in Pennsylvania practice. The residuary legatee, though **Right to Administer** disqualified to act as administrator by non-residence, was, nevertheless, held entitled to nominate an administrator.

## EVIDENCE.

The case of *Bruendl's Will* (S. C. Wisconsin), 78 N. W. 169, contains an interesting decision upon the interpretation of a statute regulating the admission of testimony of attending physicians. The statute provided that no physician should disclose information, acquired professionally while attending a patient, which was "necessary" to enable him "to prescribe for such patient as physician." The court held that the statute, while it should be construed liberally, still, being in derogation of the common law, should not be enlarged further than the legislative intent required. It applied to all information given by a patient bearing on his condition which would aid the physician to fully comprehend it, so that he might "prescribe for it"—in the most liberal sense of the term, not merely that he might prescribe medicines, but might take any steps or direct any course of conduct or *regime* looking to the improvement of the patient's health, mental or physical. But the statute did not apply to exclude evidence of a physician's examination, when made not for the purpose of applying remedial measures, but only to ascertain the patient's condition for some other purpose—as here—to discover if her mental condition was such as to render it advisable that she resume control of her property.

## FRAUDULENT CONVEYANCES.

In Michigan the legislature has remedied a defect in the common law by enacting that an administrator may pursue for the benefit of creditors property which has been conveyed to defraud them. In *Beith v. Porter*, 78 N. W. (Mich.) 336, the statute was liberally construed so as to apply to a case where the decedent had never had title himself, having taken title in his wife's name.

## GUARDIAN AND WARD.

*X v. Y*, [1899] 1 Ch. 526, is an important case. A man died, having by his will appointed his widow and his father testamentary guardians of his son, with survivorship. The father died; the widow married a Roman Catholic (the other parties in interest all being Protestants), and the child's grandmother now applies to court, under Act of 1886, for appointment of another guardian to act with the mother. Admitting their power in the premises, the court, nevertheless, refused to act, holding that their power was only to be exercised for the benefit of the

**GUARDIAN AND WARD (Continued).**

child, and there was nothing to show that the child needed any additional guardian.

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**HUSBAND AND WIFE.**

A married woman's status has not been and should not be changed so far as to permit her to sue her husband on ordinary contracts. The importance of Pennsylvania Act, 1893, P. L. 345, § 3, forbidding such suits, is illustrated in *Hann v. Trainer*, 42 Atl. (Pa.) 367, where an affidavit was held sufficient, which set forth that the plaintiff sued as assignee of the wife only to escape the operation of this statute.

New Jersey has recently (*Atlantic City Co. v. Goodin*, 42 Atl. 333), renewed allegiance to the doctrine that, in the absence of statutory prohibitions, common law marriage by *verba de præsenti* are still valid, and this in spite of cases like *Voorhees v. Voorhees*, 46 N. J. Eq. 411, holding that cohabitation and reputation will not justify a presumption of marriage, where the relation started by one of the parties, himself married, tricking the other into the performance of a marriage ceremony.

A safe rule was adopted with respect to foreign divorces in *Magowan v. Magowan*, 42 Atl. (N. J.) 330, where the court decided that, admitting the divorce decrees of another state to be entitled to as much respect as any other judgments, yet it was still eligible for the injured party to show that the decree had been obtained by imposing false jurisdictional facts upon the foreign court.

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**INFANCY.**

*Hilton v. Shepherd*, 42 Atl. (Me.) 387, involved the question what act on the part of an infant amounted to a ratification of his voidable contract, and it was easily held that his sale of the horses purchased by him after coming of age was such ratification as prevented him from recovering the consideration paid by him.

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**LIBEL AND SLANDER.**

In a suit for slander after the plaintiff's witnesses had testified to the speaking of the words charged in the petition, without saying anything as to the language in which the words were spoken, the defendant introduced some evidence to the effect that the Irish language was used. The court below in instructing the jury said: "The words charged are

Suit by  
Wife Against  
Husband

Common Law  
Marriage

Foreign  
Divorce,  
Validity

Infant's  
Contract,  
Ratification

Slander,  
Presumption  
that the  
Words were  
Spoken in  
English

## LIBEL AND SLANDER (Continued).

charged to have been spoken in the English language. So that, to entitle the plaintiff to recover in this action, it must appear that these words were spoken in the English tongue. If spoken in a foreign tongue, there can be no recovery in the petition in this case, for it is not claimed they were spoken in a foreign language, and no translation is given." . . . "The presumption, I think, is that they were spoken in the English tongue, and in the absence of proof to the contrary, the jury would be justified in assuming, then, the words were spoken in the English tongue, if spoken at all." Held, by the Supreme Court of Ohio, that this was not error. "This," said Burket, J., "is an English-speaking nation, and our courts and schools use that language, and the natural presumption is that English was used until the contrary is made to appear." *Heeney v. Kilbane*, 32 N. E. 262.

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## MASTER AND SERVANT.

In England the legislature has intervened to relieve the employe from the common-law rules. *Lowe v. Pearson*, [1899] **Employers' Liability** 1 Q. B. 261, shows, however, the disposition of the courts still to protect the employer. It was there held that the Workmen's Compensation Act of 1897 did not apply to the case of a boy injured by machinery which it was no part of his duty to touch.

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## MORTGAGES.

A mortgage may be reformed to correspond in material details with the note for which it is security; nor is there any **Reformation** duty imposed upon the mortgagee to examine the papers, such as will deprive him of his right to reformation, if he fails to examine: *Tarke v. Bingham*, 55 Pac. (Cal.) 759.

The difficulties that surround the unwholesome practice of conveying property absolutely when the transaction is really intended as a loan are illustrated in the case of **Bill to Redeem** *Bourgeois v. Gapen*, 78 N. W. (Neb.) 639. Upon bill filed to redeem, though the mortgagee had tried to take advantage of his nominal title, it was, nevertheless, held that the mortgagor should be charged with all disbursements necessary to carry out the original understanding of the parties.

**MORTGAGES (Continued).**

It is well settled that a holder of an assignment of a mortgage as collateral security is entitled to receive payment of it and give a valid discharge; particularly can there be no doubt when the assignment contains an express authority. Hence, in *Lowry v. Bennett*, 77 N. W. (Mich.) 935, it was held that a discharge by the assignee by mistake bound the mortgagee as against an innocent purchaser who relied on the discharge.

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**MUNICIPAL CORPORATIONS.**

A police jury, having ordered an election whereat was submitted the question of the levy of a special tax in aid of a railway, to be constructed through the parish, and **Railroads, Municipal Aid** having compiled the returns and declared that the tax had been voted for by a majority of the qualified voters, and having formally adopted an ordinance levying the tax, is without legal capacity to pass another ordinance repealing the former one and annulling the tax, the railway having in the meantime been built: *Missouri K. & T. Trust Co. v. Smart* (Supreme Court of Louisiana), 25 So. 443.

A statute of Michigan provides that when the council of a city shall, by resolution, declare that it is expedient to have waterworks constructed, and that it is inexpedient for the municipality to build such works, a water company may be organized. In an action on a contract to recover for water furnished to the city, it appeared that the contract recited the adoption of the resolution provided for in the statute; that the contract had been approved by the council; that the parties had acted under it for sixteen years, and that the company had expended large sums on the faith of it. Held, that the city was estopped to deny its power to enter into the contract on the ground that no resolution was, in fact, passed: *Luddington Water Supply Co. v. City of Luddington* (Supreme Court of Michigan), 78 N. W. 558.

The Supreme Court of Michigan, following a well-established rule of the law of municipal corporations, has decided, in *Black v. Common Council of Detroit*, 78 W. W. 660, that a city has no implied or incidental power to enter into contracts requiring the expenditure of money for entertainments or celebrations, and that the city is not liable even to a *bona fide* contractor who furnishes goods for such entertainment.

## NEGLIGENCE.

In *Fletcher v. Phila. Traction Co.*, 42 Atl. 527, the Supreme Court of Pennsylvania held that a street car company is not bound to instruct a conductor of nine years' experience, when taking out, for the first time, an open summer car, with a running board on the side, whereby it was extended nearer cars on the other track, of the danger of being struck by such while on such board.

The deceased had been a conductor for nine years, but had always operated a closed car. He was given on this occasion an open car, and shortly after starting on the trip, a violent thunderstorm arose and he went along the running board to pull down the curtains at the sides. Just at that moment a closed car passed, a crash was heard, and he was found dead on the roadbed. The marks upon his body indicated that he had been struck by the passing car. The negligence alleged was in not notifying the deceased of the danger incident to the passage of an open and closed car on tracks only 37½ inches apart. The Supreme Court held that the company was not bound to notify the conductor of the above danger. The danger was as obvious to him as to any one else, and he was neither young nor inexperienced, and, therefore, no recovery would be allowed.

It is now becoming well understood that an employer may be liable for the work of an independent contractor, to wit, in those cases where he has ordered the doing of a thing which, when done, is an interference with the rights of others. In *Holliday v. National Telephone Co.*, [1899] 1 Q. B. 221, it was held, however, that this does not apply to a company which has employed an independent contractor to connect the tubes in which its wires were threaded. The negligence of a servant of the contractor in using a defective lamp about the work was purely collateral to the undertaking and for it the company was not responsible.

## OBITER DICTUM.

In *Brown v. Chicago & N. W. Ry. Co.*, the Supreme Court of Wisconsin finds it necessary to distinguish between what is "obiter" and "decided in a case" and what is mere obiter dicta. "Judicial Dicta" "It is a mistaken opinion," says the court, "that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the questions presented and consid-

OBITER DICTUM (Continued).

ered and deliberately decided by the court leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved. Nothing is obiter, strictly so called, except matters not within the questions presented—mere statements or observations by the judge who is writing the opinion—the result of turning aside, for the time, to some collateral matter by way of illustration.” The court then quotes, with approval, what is said by Bouvier: “It is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point. Such dictum, if dictum it is, should be regarded as ‘judicial dictum,’ in contradistinction to mere obiter dictum:” 78 N. W. 771.

PARENT AND CHILD.

Statutes regulating contracts of apprenticeship usually provide that they must be signed by the minor. In *Anderson v. Young*, 32 S. E. (S. C.) 448, it was held that such a contract, though not signed by the minor and therefore voidable by him, was nevertheless binding on the parent, who had executed it; and if the contract appeared to be carried out so as to benefit the infant, the parent could not, by reason of the child’s failure to sign, regain the custody of the child.

PLEADING AND PRACTICE.

The Supreme Court of Wisconsin has recently decided that under the statute of that state providing for replevin, which requires an affidavit by the plaintiff setting forth that “his personal goods and chattels” have been unlawfully taken or are unlawfully retained, and for judgment for defendant when plaintiff fails in his case for a return of the property or its value, replevin will not lie to recover the body of plaintiff’s brother in the hands of an undertaker, to whom it had been delivered by the authorities of a hospital. The court refers to the English cases that there can be no property in a human body, and to the American cases which maintain a *quasi*-property, and also to cases in equity of the prevention of interference with the control of the dead body by persons not entitled; but the decision is based upon the statute above cited: *Keyes v. Kunkel*, 79 N. W. 649.



## PLEADING AND PRACTICE (Continued).

The United States Circuit Court for the Northern District of New York, in a suit in equity for alleged infringement of a patent, after examining the record, concluded that a successful defendant who had overloaded the record with a large amount of matter, mainly by the testimony of "too many experts and they talk too much," the testimony abounding "in repetition and irksome and prolix disquisitions," should be denied costs in the proportion which such testimony bore to the whole amount of evidence in the record: *Edison Co. v. E. G. Bernard Co.*, 91 Fed. 694.

Those who have been actively engaged in the trial of cases will appreciate the following right of control, by a trial judge, of the arguments of counsel to juries, asserted by the Supreme Court of New Jersey. It sometimes has been the course of counsel, of successful persuasive powers, in making the first speech for the plaintiff, to restrict himself to a brief outline and reserve his strength and eloquence for the reply. To avoid the influence of the "last word," counsel for defence have often waived the right to speak, preferring to keep silent rather than give the opponent the benefit of his prepared and forceful address. The ruling (March, 1899) was to this effect: When, in the summing up to the jury, the defendant's counsel refuses to reply to the opening argument on behalf of the plaintiff on account of its meagre and unsubstantial character—although the customary practice is not to allow the plaintiff to make a second argument—it is within the discretion of the court to permit the making of a second argument by the plaintiff; "or, to state it more accurately, to make a fuller and more complete opening." If such permission is granted, the defendant has a right to be heard in reply to such further address; and, if he exercise that right, the plaintiff is then entitled to make the closing argument: *New York & L. B. R. R. Co. v. Garrity*, 42 Atl. 842.

A recent ruling of the United States Court of Appeals, Eighth Circuit, seems clear from the nature of the subject and well supported by authority. It is to the effect that, when leave to intervene in an equity case is asked and refused, the order made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the inter-

**Excessive and  
Irrelevant  
Testimony  
Cause for  
Reduction of  
Costs in  
Equity of  
Successful  
Party**

**Arguments of  
Counsel to  
Jury,  
Control of  
Court Over**

**Federal Court  
Order Deny-  
ing Leave to  
Intervene  
Not Appealable**

## PLEADING AND PRACTICE (Continued).

vention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. An appeal cannot lie from such orders. They lack finality. "It is usually said of them that they cannot be reviewed, because they merely involve an exercise of the discretionary power of the trial court. In cases, however, where a denial of the right of a third party to intervene would be a practical denial of a certain relief, to which the intervener is fairly entitled and can only obtain by an intervention, the order of denial is not discretionary, and will generally furnish the basis of an appeal:" *Credits Co. v. United States*, 91 Fed. 570.

## PRINCIPAL AND AGENT.

*Hall v. Murdock*, 78 N. W. (Mich.) 329, is a recent example of the familiar principle that an agent's admissions do not bind his principal, unless within the scope of his employment; hence an agent's admission that an elevator cable is defective is not evidence in a suit for damages for an injury caused by the breaking of the cable.

It has long been well settled that parol evidence is admissible to prove that the nominal party to a written contract is only an agent, for the purpose of conferring either benefits or liability upon the real principal (though not, of course, for the purpose of exempting the nominal agent from liability): Accord, *Smith v. Felter*, 42 Atl. (N. J.) 1053.

## PROPERTY.

The question of proprietorship in corpses is an interesting one. *O'Donnell v. Slack*, 55 Pac. (Cal.) 759, throws some light upon it. It was there held that, as the decedent had not asserted his own right to determine where he should be buried, that belonged to his next of kin—here his wife—and she could determine it without respect to the wishes of the executor, although the expenses should, of course, be paid by the latter.

## REAL PROPERTY.

In *Mattes v. Frankel*, 32 N. E. 585 (New York), a vendor took the vendee over the property before the sale and pointed out to him a way to a barn, which was part of the property. This way had been used for thirty years. The deed did not mention the way. After the conveyance the vendor brought an action for a trespass by the vendee in the

**REAL PROPERTY (Continued).**

use of this way. By a divided court it was held that the way passed as appurtenant to the property, and that the vendor was estopped to deny the vendee's right to its use.

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**RECEIVERS.**

Following *Thomas v. Car Co.*, 149 U. S. 95, it was held in *Grand Trunk Ry. Co. v. Central Vermont Co.*, 91 Fed. 569, that the creditors whose claims were preferred in the order appointing a receiver were not entitled to interest on their claims, the delay being due to a stay by the court, and therefore not furnishing any foundation for damages.

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**SALES.**

A, having sold goods to B, rescinded the sale on discovering that B was insolvent, and instituted an action of replevin to recover said goods. Held, that A need not, as a condition precedent to rescission, have returned to B drafts drawn on B for the price of the goods and accepted by him, such drafts being worthless and still in A's possession: *Skinner v. Michigan Hoop Co.* (Supreme Court of Michigan), 78 N. W. 547.

A, knowing of the existence of phosphate beds on land of B, of which B was ignorant, procured a conveyance from B on the faith of representations that the land was valuable only for the timber that was on it, and that A wanted the land to add to land of his own to complete a body of timbered land to sell as such. B lived in Connecticut and A near the land in question. On bill to set aside the conveyance, held, that though A was not bound to disclose any facts affecting the value of the land, yet having undertaken to do so, he must disclose the whole truth. Cancellation decreed: *Stackpole v. Hancock* (Supreme Court of Florida), 24 So. 914.

In *Maxwell v. State*, 25 So. 235, the Supreme Court of Alabama decides that a person receiving apples to be distilled into brandy on shares does not, by delivering to the owner of the apples his portion of the product, violate a law which prohibits the sale, gift or other disposition of intoxicants.

## SURETYSHIP.

Some nice deductions from elementary law are seen in *Hallock v. Yankey*, 78 N. W. (Wis.) 156, holding (1) that a  
**Surety,** surety for a corporation cannot claim to be dis-  
**Discharge of** charged by the extension of time given the corporation, when he, as officer of the corporation, had himself obtained the extension, and (2) that when one co-surety is discharged, the other co-surety is discharged to the extent of one-half of his debt, being the additional damage which he would otherwise suffer by the discharge of the first co-surety.

*Greenwood v. Francis*, [1899] 1 Q. B. 313, just touches on a nice point of law, viz., whether an agreement by a surety to  
**Agreement** give time to the principal discharges a co-surety;  
**for Time** but the case turned on another point, as the mortgage which had been assigned by the creditor to the plaintiff surety expressly provided that no extension by the creditor should affect his rights against the sureties.

## TELEGRAPH COMPANIES.

*In Western Union Telegraph Co. v. Chamblee*, 25 So. 232, the Supreme Court of Alabama decides that a contract with a  
**Contract to** telegraph company releasing the company from  
**Repeat** damages for mistakes in transmitting messages,  
**Message,** unless the sender requires the message to be re-  
**Duty of** peated, is invalid as being "induced by a species  
**Sender** of moral duress."

The court also holds that the sender of a telegram owes no duty to the telegraph company to inquire whether his message was correctly transmitted and received, and in an action against the company for negligence in transmission, contributory negligence cannot be imputed to him for not so inquiring.

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MANDAMUS; DUTY OF RAILROADS TO RUN TRAINS FOR PASSENGERS ONLY. *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.*, 52 Northeastern Reporter, 292. This case came before the Supreme Court of Illinois on an appeal from the Circuit Court of Franklin county, which had refused to issue a writ of mandamus commanding the railroad company to operate a daily passenger train from East St. Louis to Eldorado. The Supreme Court reversed the decision of the lower court on the ground that the right of the people to insist on the running of a separate passenger train is implied from the charter obligation to equip and operate the road. "It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of a

railroad. The transportation of passengers on a mixed train is subordinate to the transportation of freight. Railroad corporations are bound to the exercise of the highest degree of care and diligence in the conduct of their business. But there are necessary differences between passenger and freight trains; and, although a limited discretion may be exercised as to what rolling stock and equipment are necessary for the suitable and proper operation of a railroad carrying passengers, the legitimate exercise of this discretion begins only when the mode of carrying passengers is distinct from the mode of carrying freight." In this last sentence we have the gist of the decision, and the court skilfully led up to it with the statements about the charter obligation to operate the road suitably and properly, in order to avoid the general rule that the court will not interfere with the management of railways in these respects except where the act sought to be enforced is specific, and the right to its performance in the manner proposed clear and undoubted.

A new duty is hereby imposed upon railroad companies—one which, if they are rigorously obliged to fulfil it, will put some of them to great inconvenience. The Illinois court qualified their decision by declaring that the expense of running a train especially for passengers should be justified by the amount of business done on the particular line of road over which the daily passenger train is to be run. This qualification, however, is shorn of much of its effect by the court's refusal to give weight to the allegation that the Eldorado line, considered separately, did not earn enough to justify the expense of running a daily passenger train. The court remarked: "The appellee operates its main road and its leased branches [one of which was the Eldorado line] as one system, and, as thus operated, the main road and its branches yield the net yearly income of about \$600,000." "The whole business of the various parts operated as one line should be taken into consideration." Therefore, "a small part of the continuous line, which happens to run through a section of country where the freight is not so much and the passengers are not so many as on some other parts of the line," cannot be taken by itself and the train service regulated accordingly.

This decision may be justified by the conditions of transportation in Illinois and Missouri, but we doubt whether it is applicable throughout the whole country. The reasonableness of the requirement should be scrutinized in each particular case, and to determine judicially that a daily passenger train is the minimum of service that a railroad company may provide for those who ride on its line seems likely to result sometimes in injustice to the company, and ultimately to harm some sections of the people. Prosperous railroad companies will be slower to extend their branches into untapped country districts if they are to be forced to operate according to a rule of law which fails to take into account the circumstances of the case and the comparative necessity of transportation facilities.

There are few cases at all like the one under consideration, but their very rarity shows the reluctance of the courts to issue a writ of mandamus prescribing the performance of certain actions to quasi-public corporations. They hardly ever take any steps before requiring the clearest proof that it was intended by the legislature to make the corporation actively perform the alleged duty. *In re The New Brunswick and Canada R. Co.*, 17 New Brunswick (1 Pugsley & Burbidge) 667 (1878), is a case frequently cited as deciding that a railroad company can be compelled to run daily trains over its line. This duty, however, was especially imposed by the statute under which the Canadian Railway was incorporated, and, besides, from what appears in the report, the company was held to comply with this express stipulation by running daily over its line a mixed train, just as the Missouri Company was doing before the writ of mandamus issued against it. The case of *The Ohio & Mississippi Railway Company v. The People*, 120 Ill. 200 (1887), while somewhat different in its facts, is against the position now taken by the Supreme Court of Illinois. The statement in that case, that "a company running a daily passenger train each way over an unprofitable road certainly does fully as much as the law requires of it, so far as passenger trains are concerned," should not be taken, as it is by the present Supreme Court, to hold affirmatively that a daily passenger train is always required to be run. For in the case decided in 1887 the railroad was running already a daily passenger train, and the court was merely stating that the railroad was furnishing sufficient service—not that it was furnishing too little or just enough to pass muster. It is to be remarked, also, that the mandamus was refused in the former case, and that the court then used the following language: "It is believed no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled by mandamus to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common law authority for making such an order." Now, since the same remarks apply equally to a mandamus to run a daily train for passengers only over a railroad line, we are inclined to think that the reasonableness of the requirement of passenger service may be seriously questioned.

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STATUTE OF LIMITATIONS; ACTION FOR CONSEQUENTIAL DAMAGES; CONTRACT FOR THE BENEFIT OF THIRD PERSONS. In *Kuhl v. Chicago & Northwestern Ry. Co.*, 77 N. W. 155 (Wisconsin, Nov. 1, 1898), a railroad company with proper authority, having constructed its track on a public street, afterwards sold out to another company, which agreed to pay all its existing debts, liabilities and obligations. A property owner along the line of the road, entitled to damages because of the obstruction to the street, instituted suit against the second company. It was pleaded in defence that the statutory period had elapsed during which the action



might have been maintained. The agreement of the company to assume, among other responsibilities, the liability of the original company to the plaintiff, was, however, held to constitute a new and independent contract for his benefit, which the running of the statute against the former company could not defeat.

With due respect to the learned judges who are responsible for the above decision, there seems to be no authority for their position. A person whose property has been injured in the exercise of eminent domain has the right to proceed under the special statutes giving him a remedy, or by the common law action of trespass, if the injury is one within its application. In either case the wrong is not a breach of contract.

The measure of damages is the difference between the value of the land immediately before such construction and immediately after its substantial completion: *Railroad Co. v. Burson*, 61 Pa. 369 (1869). Upon such completion the damages are at once recoverable, and must all be recovered in one action: *Railroad Co. v. McAuley*, 121 Ill. 160 (1887); *Lyles v. Railroad Co.*, 73 Tex. 95 (1889); *Lohr v. Railroad Co.* 10 N. E. (N. Y.) 528 (1887). The English cases have confined the exceptions to the rule that no person can become entitled to any rights under, or demand the performance of, a contract to which he is not a party to its narrowest limits. See Pollock on Contracts, 196 *et seq.*, and Anson on Contracts, 212 *et seq.* The broadest accepted statement of the rule in this country is, that a party may maintain *assumpsit* on a parol promise made to another for his benefit. Judge Bigelow (on whose statement of the principle in *Brewer v. Dyer*, 7 Cush. 337 (1851), the court seems to have relied), in his book on Torts, p. 619, upon the cases of telegraphic dispatches, contends that the action is not *ex-contractu*, but founded on the wrong of which the contract is the occasion. An examination of the authorities, however, fails to disclose any decisions which may be regarded as sustaining a broader proposition than that which extends the right to all actions where *assumpsit* may be maintained.

In *Brewer v. Dyer*, 7 Cush. 337 (1851), Bigelow, J., said: "Upon the principle of law, long recognized and clearly established in this commonwealth, that where one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. In the case of *Carnegie v. Morrison*, 2 Met. 381, all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the cases would seem to indicate, nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff, but upon the broader and more satisfactory basis that the law, operating on the act of the parties, creates the duty, estab-

lishes the priority, and implies the promise and the obligation on which the action is founded." The facts were that the plaintiff had leased his premises to one who subsequently surrendered them to a third person, who thereupon agreed with his vendor to pay the rent to the landlord, and it was held that the landlord, who acquiesced in his possession, was entitled to recover on this promise.

In the case under discussion the contract was not the occasion of the injury, and the telegraphic dispatch cases are not relevant.

"Where an action rests upon a promise, a new promise or acknowledgment of indebtedness so absolute that from it a promise to pay may be implied, will start the statute of limitations afresh. But in case of a tort, an admission that it was committed within six years cannot make the party guilty of committing it afresh:" 13 Am. & Eng. Ency. of Law, 749; *Oothout v. Thompson*, 20 Johns (N.Y.) 277 (1823); *Goodwyn v. Goodwyn*, 16 Ga. 114 (1854); *Gallagher v. Hollingsworth*, 3 H. & M. (Md.) 122 (1793); *Brand v. Longstreth*, 15 N. Y. 325 (1857); *Fritz v. Shade*, 9 Hun. (N.Y.) 145 (1876); *Armstrong v. Swan*, 109 Pa. 177 (1885); *Ott v. Whitworth*, 8 Hump. (Tenn.) 494 (1847); *Hurst v. Parker*, 1 B. & Ald. 92 (1818); *Taeceur v. Stuart*, 6 B. & C. 303 (1827); *Morton v. Chandler*, 8 Me. 9 (1831); *Whitehead v. Howard*, 2 B. & B. 372 (1823); *Short v. McCarthy*, 3 B. & Ald. 626 (1820).

In *Hurst v. Parker*, 1 B. & Ald. 92 (1818), cited with approval in *Oothout v. Thompson*, 20 Johns (N. Y.) 279 (1823), "in trespass for breaking and entering coal mines and taking away coal," there was a plea of the statute of limitations and replication thereto in the affirmative. At the trial no evidence was given to show that the trespass was actually committed within six years. It was held that evidence of a promise to make compensation by the defendant before the commencement of the action, and when he was threatened with an action for taking away coal, was not sufficient to support this issue, by which the plaintiff was bound to prove the affirmative that he had a good cause of action within six years of the commencement of the suit. It has, nevertheless, been held, in an action founded in tort, that a distinct promise to pay, provided plaintiff would not bring suit, might operate by way of estoppel, but not to revive the dead tort: *Armstrong v. Levan*, 109 Pa. 177 (1885).

The present case must also be distinguished from one where the railroad company had executed its bond to the injured property owner. By the acceptance of the bond the acts of such company are made lawful, and the property owner is relegated to an action upon the bond: *Keller v. Railroad Co.*, 151 Pa. 67 (1892). A change in ownership of the railroad property neither revives the old nor creates a new cause of action: *Frankle v. Jackson, Receiver*, 30 Fed. 398.

## BOOK REVIEWS.

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**THE LAW OF BANKRUPTCY.** By EDWIN C. BRANDENBURG. Chicago: Callaghan & Co. 1898.

Any new treatise on the National Bankruptcy Law of 1898 naturally and necessarily challenges comparison with the already numerous books on the subject, and especially with that of William M. Collier (Bender, 1898), which is much the most satisfactory effort to treat the subject that has come to the notice of the writer of this review. There are some details, at least, in which Brandenburg has improved somewhat on his predecessor. They both recognize the necessity of printing at length the corresponding sections of the Act of 1867; but Brandenburg has inserted the required sections immediately after the sections of the Act of 1898, to which they are comparable, thus assisting the practitioner more than Collier, who reprints the Act of 1867 only as a whole at the end of his treatise. It probably is wiser, too, to subdivide the sections according to their clauses, allowing each clause to be followed by the notes immediately pertaining to it. Collier's method of combining all the notes at the close of each section makes it occasionally difficult to ascertain just which notes refer to any given clause. Of course, too, it goes without saying, that Brandenburg gains by postponing his publication until the rules and forms had been announced by the Supreme Court. This advantage, however, can readily be regained by Collier upon the publication of the second edition.

When the reviewer has mentioned these points, however, he has said all that can properly be said in favor of the later book. In its general treatment of the important problems of substantive law involved in the interpretation of the bankrupt law, Brandenburg has not by any means appreciated his opportunity. Evidently a great deal of time and care has been devoted to the preparation of his works, as is amply proved by the very full and elaborate notes, but the result is in a somewhat crude and undigested form, painfully suggesting to the consecutive reader a digest rather than a text book. The cases are, perhaps, all referred to, but in such a way that it is almost impossible to tell which are the leading cases, and especially is this true where the authorities are conflicting. If the conflict is noticed at all, there is certainly no assistance given to the reader by means of comparison of the authorities—much less by an expression of the author's opinion—in arriving at the proper conclusion. This criticism might be illustrated from any of the more important sections of the act; among others by the following, selected almost at random: § 2, page 22, where the important question of the authority of the district court over liens is hardly noticed (see page 22); § 3, where fraudulent convey-

ances, preference, insolvency and intent, the fundamental problems of the law are inadequately treated; § 63, b, in which the propriety of proving claims arising out of mere torts is apparently not dreamed of; and § 67, f, where the author throws no light upon the interpretation of the apparent conflict between the clause, and clause C of the same section.

On the whole, after the really entertaining and suggestive treatment by Collier of the same subject, the study of the book seemed comparatively dry and unprofitable.

*R. D. B.*

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**THE LAW OF EVIDENCE.** By SIDNEY L. PHIPSON, M. A. (Cantab.) of the Inner Temple, Barrister-at-Law. Second Edition. London: Stevens & Haynes. 1898.

The author of this volume has tried to fill the gap between Stephen's Digest of the Law of Evidence and the great and complete work on Evidentiary Law by Taylor. The analysis and arrangement of the subject matter are very similar to those made by Stephen. The first edition came out in 1892. In the edition before us the chapter on the Admissibility of Extrinsic Evidence to Affect Documents has been much amplified and remodeled; and certain extraneous topics dealt with in Taylor have been purposely omitted. The volume is especially valuable and useful for the complete list of cases, brought down to January, 1898, and forming practically a complete digest of English and Irish Decisions on Evidence. It also contains an index of the subject-matter and the titles of all the principal English statutes. The volume is the ordinary size and contains about 600 pages.

*P. D. I. M.*

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**THE FACTORY ACTS.** By the late ALEXANDER REDGRAVE, C. B., Her Majesty's Chief Inspector of Factories. Seventh Edition. By JASPER A. REDGRAVE and H. S. SCRIVENER, M. A. London: Shaw & Sons; Butterworth & Co. 1898.

The seventh edition of Redgrave's Factory Acts will prove of renewed value to the British practitioner whose duties lead him to consult the complicated Acts of Parliament in relation to the regulation of factories and workshops. The book opens with an introduction giving the history of legislation on the subject, and then follow the statutes now in force, which are in most instances set forth at length, with copious annotations and references to cases. The index is a ready guide to the mass of information contained in the work. Americans who are concerned with the question of factory regulation in its many phases will find that this well-edited volume indicates in a clear and systematic manner how the problem has been treated in a country where much serious thought has been devoted to it.

*T. S. W.*

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## A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART I.

During the one hundred and ten years which have passed since the last of the thirteen "original" states adopted the National Constitution, fifteen positive and avowed amendments to, or alterations of, it have been made. The first ten were adopted together, and form what is known as the "Bill of Rights," and were practically contemporaneous with the Constitution itself. Of the remaining five, the first simply denies a certain "construction" to an existing article. The second makes some not very radical changes in the method of choosing a President and Vice-President by the Electoral College. The last three, important as are their practical effects, are closely in line with the "Bill of Rights"—the most drastic change being the absolute prohibition of slavery. These five amendments were declared in force in 1798, 1804, 1865, 1868 and 1870, and will all be noticed more fully later on. They are only mentioned here to bring out clearly the fact that the positive and avowed changes in the Constitution have not been numerous; and, it may be added, that they have not been fundamental. We shall find, on the other hand, that the unavowed and indirect alterations and amendments,

by way of judicial construction and by the gradual growth of certain practices now so customary that we have ceased to notice them, have so changed the Constitution as it framers and contemporaries understood and intended it, that it has all but lost its identity. It is not putting the case too strongly to say that the Constitution of the United States, which is the supreme law of the land to-day, is not that of a hundred and ten years ago, but merely a growth from it; and, indeed, it may be said that upon this growth there have been grafted certain limbs which would never have shot forth from the original tree. I shall endeavor to show the progress of these changes in the Constitution. The study will be of great interest, at least, to me; and I venture to hope that it will not be without interest to any student of American history. It is not my wish or intention to do over again what has already been so well done more than once—that is, to write a history of the Constitution in the ordinary sense. Of course, in order to arrive at what the Constitution really meant to its framers and contemporaries, I must necessarily speak of things which occurred before its adoption, and which led to its adoption; and, in so doing, I shall not be able to avoid repetition of what others have told before me. I shall hardly be able to avoid a few pages that will seem elementary to all who are familiar with the general theme; but the same difficulty confronts all writers on historical subjects, and all are compelled to meet it as best they may.

The Constitution of the United States, as finally adopted in 1789, contained a preamble and seven articles. These articles were divided into sections, the whole being shorter than many a modern statute. Our first inquiry will be, How did this instrument come into being, and what was it thought to be and intended to be, as a whole, by its framers and adopters?

Prior to the outbreak of the Revolution—I omit the adjective “American,” as that struggle must ever be to *us the* Revolution—there were thirteen distinct commonwealths, each entirely unconnected with the remaining twelve by any political bond. True, each was a dependency of the British Crown; but so were other colonies in different parts of the world. And

there were distinct differences in the character and closeness of the dependence upon the Mother Country. The colonies had widely different histories—their early settlements had not been the same. An account of these differences is not within the scope of this work, but the fact of their existence is of great importance, and must be borne in mind constantly in studying their gradual steps toward union. They are usually classed as provincial, proprietary and charter governments. But each and all of them had local legislatures or assemblies, one branch of which was chosen directly by the people. And it is impossible to read the history of any one of them without noticing how tenaciously they clung to the rights and powers of these legislatures or assemblies—how jealous they were of any curtailment or infringement of these rights and powers.

It was not, however, until the latter half of the last century, after having been harassed by arbitrary measures of the English Parliament and ministers for ten years, that anything like united effort to guard their rights was made. It seems that, without the consent of Parliament, they could not have united in a general government for any purpose, and it was nowhere contended that they could. When, however, in May, 1774, it was learned that by act of Parliament the port of Boston was to be closed, all the colonies felt that the time had come for action; that this attempt to punish Massachusetts for insisting upon her rights was a blow at every colony on the continent; and, after consultation, they determined on a General Congress at Philadelphia the following September—in fact, Virginia suggested an annual Congress—and in due time the first Continental Congress assembled, composed, in their own words, of “the delegates appointed by the good people of these colonies,” Georgia alone being unrepresented. As Curtis remarks, in his admirable History of the Constitution, “No precedent existed for the mode of action to be adopted by this assembly. There was, therefore, at the outset, no established principle which might determine the nature of the union.”

The idea, however, of united action by the colonies in Congress or convention assembled, was not entirely new. In 1765



all but four of them (Virginia, New Hampshire, Georgia and North Carolina) sent delegates, at the suggestion of the legislature of Massachusetts, to a convention in New York to consider the state of public affairs, and this convention made public declaration that the liberties of the colonies were founded on natural rights, not on royal charters, and denying the right of taxation without representation. But the Congress of 1774 was the first Continental Congress, with the avowed purpose of taking united action of some sort. The proceedings are, therefore, highly important to us in this inquiry. The first day of the session was taken up with the presentation of credentials, after the Congress had unanimously chosen Mr. Randolph, of Virginia, President, and Mr. Charles Thomson, Secretary. The credentials differed in many particulars—all alike, except one or two, which simply certify the appointment of the delegates, direct their representatives to consider with their fellow-members some means by which the present difficulties can be overcome and their recurrence prevented; a few are instructed to consider the best way of ending the “unhappy differences” between the colonies and the Mother Country. The delegates had been variously appointed—some by popular meetings held for the purpose, some by the committees of correspondence, some by direct vote (New York), some by special conventions. In one case—Rhode Island—the commission to the delegates nominated by the legislature was actually secured under the hand and seal of the Captain General of the province. They are commissioned to represent the colony “in consulting upon proper measures to obtain a repeal of the several acts of the British Parliament for levying taxes upon His Majesty’s subjects in America without their consent, and particularly an act lately passed blocking up the port of Boston, and upon proper measures to establish the rights and liberties of the colonies upon a just and solid foundation.” The number of delegates from the various colonies differed from two each from New Hampshire and Rhode Island to eight from Pennsylvania. It is very evident, from the tone of the credentials and from the circumstances, that each delegation was consid-

ered as a unit representing its particular colony, and that there was no thought of individual voting.

On the second day it was determined that each of the colonies should have one vote, there being no means of ascertaining their relative importance. They also resolved to sit with closed doors, and, further, to appoint two committees, one to "state the rights of the colonies in general, the several instances in which those rights are violated or infringed, and the means proper to be pursued for obtaining a restoration of them;" the other "to examine and report the several statutes which affect the trade and manufactures of the colonies." Two delegates from each colony were afterwards appointed on the first committee, and one from each colony on the second committee.

On Saturday, September 24th, less than three weeks after its appointment, the first committee brought in its report of the violations of American rights, which was immediately read, and its consideration postponed until Monday, Congress in the meantime to deliberate "on the means most proper to be used for the restoration of our rights."

There is pathos in this action, as it seems to me: the statement of the violations of their rights it was necessary to make formal and complete, but every member was but too familiar with them already, and all were eager to hasten *redress*, too impatient for this fondly hoped-for result to be willing to postpone for an hour consideration of means to accomplish it.

On Monday, the day to which the consideration of the report had been deferred, Congress was still too busy considering the remedy to attend to aught else, and they continued this consideration until the next day, when they unanimously resolved to boycott Great Britain and Ireland after December 1, 1774, as to imports, and the day after, as to exports after September 1, 1775, "unless the grievances of America are redressed before that time," and this a *century* before Captain Boycott was compelled to harvest his own crop! A committee was appointed to bring in a plan for carrying this resolution into effect.

This was the first positive, definite, step taken by the colo-

nies as a whole. A few days later, however (on October 1st), they unanimously resolved upon a "loyal address to his Majesty, dutifully requesting the royal attention to the grievances," etc., and appointed a committee to prepare it. In this, and subsequent resolutions, the expression "America," or "All America," is frequently used to designate the colonies collectively or the people of the colonies collectively: for example, they approve the resistance of Massachusetts to the late acts of Parliament, and say that if it is attempted to carry these acts into effect forcibly "*All America* ought to support them in their opposition." The idea of the essential oneness of the settlements in America was gradually, perhaps imperceptibly, growing.

Moreover, but a few days later, in a letter to General Gage remonstrating with him for raising fortifications, they say that he cannot be a stranger to "the determined resolutions of the colonies, for the preservation of their common rights, to *unite* in opposition to" the Acts of Parliament. And also, that they (Congress) have been appointed "guardians of these rights." They, in addition, unanimously resolve to prepare a memorial to the *People of British America*, setting forth the necessity of "firm, united, and invariable" observation of the measures recommended by Congress.

On the twelfth of October the committee appointed for the purpose brought in its report as to a plan for carrying into effect the non-importation, etc., resolutions. It was laid on the table for the present, its consideration resumed three days later (Saturday) and continued on Monday. The journal says, "the consideration of the *plan of association* was resumed," having previously called it simply the "plan for carrying into effect the non-importation, etc., resolution." On October 20th it was agreed to and signed. After reciting the grievances, they say that, in order to obtain redress, "we (the delegates of the several colonies, etc.,) do for ourselves, and the inhabitants of the several colonies we represent, firmly agree and *associate* under the sacred ties of virtue, honor, and love of our country" to carry out the non-importation resolutions, and mutually assist each other in lessening the inconvenience caused by

their action. They resolve upon a Committee of Observation in each colony to watch "the conduct of all persons touching this association," and to publish all cases of violation of it in the *Gazette*, so as to hold the offender up to public detestation and contempt, and thenceforth he or she was to be let severely alone and no more dealt with. This seems to have been the only sanction suggested, so that Congress did not entertain any idea of giving *governmental* powers of any kind to this "association." But, none the less, it was a *union* for certain purposes. With this direct purpose of uniting all America in the common cause, an address to the people of Quebec was prepared—in it is used this significant language: "Your province is the only link wanting to complete the bright, strong *Chain of Union*," "unite with us in *our social compact*," "that you should be invited to accede to our CONFEDERATION." And in the petition which they sent to the King, they style themselves "We, your Majesty's, faithful subjects of the Colonies of New Hampshire, etc., in behalf of ourselves and the inhabitants of those colonies who have deputed us to represent them in General Congress."

Such was the actual work of—such were the actual words used by—the Congress of 1774. All that its members said and did must ever be of interest. But a great part of it is foreign to our present inquiry. Writing forty years later Mr. John Adams does not treat his fellow-members in this nevertheless remarkable Congress with much respect. His letter to Mr. Jefferson of November 12, 1813, is amusing; but the only important sentence for us is that he says they were "one-third tories, another whigs, and the rest mongrels." However divergent their general views, they all recognized the urgent necessity of union. In speaking of the work of the Congress, Mr. Charles Francis Adams says: "Above all, and more than all, the foundations of a Grand American Combination had been laid, and the men upon whom its success would depend had been brought together, had been made to esteem one another." Mr. Henry said, in debate, "The *Constitution* of the colonies was founded on the broadest and most generous base," and in the underlying thought he was in accord with

many of his fellow-members, but not with all. For Mr. Gallowsay said truly enough, in a strict sense, a little later, "I know of no American Constitution. A Virginia Constitution, a Pennsylvania Constitution we have. We are totally independent of each other." Here we have the two extremes of thought; one the expression of a man who had a little earlier said, "I am not a Virginian, but an American;" the other that of one who, a few years later, joined the Royalist forces in New York. But the great majority of the members were not yet prepared, in the words of Jay, "to frame an American Constitution," and he no doubt also expressed their views when he said "The measure of arbitrary power is not full, and I think it must run over before we undertake to frame a new Constitution."

The idea of an annual Congress, though suggested by Virginia alone, was in the minds of many at the time. John Adams particularly favored it. But the time was hardly ripe. The fear was entertained that such an institution would "breed extremities and ruptures" and must either "be discontinued or we must defend it with ruptures:" (Letter of Joseph Hawley to John Adams, July, 1774.) It may be fairly said, on the whole, I think, that while all were agreed upon the necessity for united action—action as a whole—there was not yet a conscious desire for real unification, except on the part of a few of the—as the events proved—more far-seeing men. Yet it is impossible not to observe, if we attentively consider what was said and done, that the whole continent was really one in its greatest interests and in the fundamental requisites for the peace and prosperity of its inhabitants. The idea of unification was germinating in the minds of the people without their being really conscious of it.

*Lucius S. Landreth.*

(To be continued.)

## WILLS EXECUTED UNDER MISTAKE OF FACT.

The question of what is the legal effect of a will executed under mistake of fact dates back to the time of Cicero and the principles of Roman law are its foundation.

By civil law the heir could not be disinherited without good reason,<sup>1</sup> and it is from this the Roman law on the subject of revocation by mistake of fact springs.

The mistake of fact might be a mistake as to the person named or a mistake in the motive or reason of the testator.

As to the mistake in the person named at Roman law an error as to the person invalidated the will, and if the testator intended to insert A as his heir and by error inserted B, the inheritance falls. But it was not every error which rendered a will invalid; a false description did not if it could be ascertained who was meant: Dropsie on Roman Law, p. 115.

An error in the motive of the testator always rendered the disposition invalid. Thus, if the testator intended to insert A, but believing him to be dead when he was not dead, inserted B, the former will be the heir.<sup>2</sup> So it was held by Cicero that if a father disinherited a son for some special reason and the reason is proved to be a mistake, the son will inherit;<sup>3</sup> and the converse is also true, that where a man made another his heir and subsequently found out that he was not his heir the will would be revoked.<sup>4</sup>

Further, it would seem that the Roman law rule, which was adopted by the common law, that a change of circumstances<sup>5</sup> in the family of the testator revoked the will, was based on the reason of mistake of fact in the mind of the testator as to who was his heir.<sup>6</sup> Although the reason given

<sup>1</sup> 2d Inst. 18 to 1.

<sup>2</sup> Digest, 28-5; Dropsie on Roman Law, p. 43.

<sup>3</sup> 1 C. 388.

<sup>4</sup> Justinian Pandects, C. 92, Dig. XXVIII, Title X.

<sup>5</sup> Salkowski's Roman Law, p. 839; Doe v. Lancaster, 5 Term Rep. 58, 5 Ed.; 1 Jarman on Wills, 124.

<sup>6</sup> Hamill's San'd Just. 256.

by the common law judges for the rule is that a "tacit condition is annexed to the will itself that a change of circumstances will revoke it."<sup>1</sup>

The mistake of fact may arise at the time of the making of the will or from a change of circumstances after the making of the will. As to the latter, which includes the subject of subsequent birth, marriage or other change of circumstances of the family, it is outside the domain of the present article which deals with mistakes of fact arising at the execution of the will, and not such as arise after it is made by presumption of law, which is fully discussed in *Young's Appeal*, 80 American Dec. 517, and the note to the case, and is largely regulated in Pennsylvania by the Act of April 8, 1833.

What, then, is the legal effect of a will executed under a mistake of fact? In the first place, if there is to be any relief from a mistake of fact or a mistake of any kind, it must be found in a court of equity.<sup>2</sup> We have seen that the mistake in a will may be as to the person or estate named or it may be as to the motive. As to mistakes of fact in the person or estate named the law is very plain, and although it is hard to sometimes distinguish between the cases, the principles are so clear, and the cases have been so thoroughly gone over that a lengthy discussion on the subject is needless.<sup>3</sup>

It is a general rule that a court of equity will only relieve such mistakes of fact when they appear on the face of the will, and this is founded on the principle that, since the Statute of Frauds, the intention of the testator as expressed in the will cannot be altered by evidence *de hors* the will.<sup>4</sup> (For a general discussion of mistakes of fact in the subject matter of the will or persons and estate named, see 66 Am. Dec. p. 630, where it is fully gone into.)

The question of what is the legal effect of a mistake of fact

<sup>1</sup> *Doe v. Lancaster*, *supra*; *Brush v. Williams*, 4 John. Chan. 506.

<sup>2</sup> *Snell v. Atlantic Co.*, 18 L. R. 79; *Whelen's Appeal*, 70 Pa. 410; *McCaul v. Davis*, 56 Pa. 435; *Kemble v. Coal Co.*, 90 Pa. 344.

<sup>3</sup> 15 Am. & Eng. Ency. 663; 1 Jarman on Wills, 334, \*p. 379; 1 Story's Eq. Jur. 99; 1 Red. on Wills, 3d Ed. 501; Kerr on Fraud, 448.

<sup>4</sup> 1 Jarman, \*p. 379; 1 Story's Eq. Jur. 99; *Wallize v. Wallize*, 55 Pa. 24; 1 Red. on Wills, 498.



in a will when the mistake is in the motive of the testator has never been decided by the Supreme Court of any state. In *Padelford's Estate*, 190 Pa. 35 (1899), the facts were as follows: One Arthur Padelford married, and a child was born by his wife during the marriage, subsequently he obtained a divorce and later made his will. In his will he said, that the child was not his child, and he therefore did not leave her anything. A bill was filed by the child's grandparents to compel Padelford to recognize the child as his. This he did by a written agreement, and the question which arose at the audit was whether the will was revoked *pro tanto* by the mistake of fact as to the child's paternity, so that she could inherit as under the intestate laws. The auditing judge held that there had been a mistake of fact and that the will would be revoked on that account. But the Orphans' Court on hearing exceptions, although granting that a mistake "may perhaps" revoke a will, decided that Padelford's Estate did not come within the principle. The court holding "that a presumption arising from facts occurring after the execution of a will depending for its establishment upon proof of external circumstances may be overcome by proof of the same character." And, therefore, it might be shown what the belief of the testator really was as to the child's paternity. The Supreme Court affirmed this opinion of the lower court for the reasons as stated in the lower court's opinion. So that the question of whether a will can be revoked by a mistake of fact is still unanswered.

This question Judge Sharswood asked in *Baxter's Appeal*,<sup>1</sup> but does not answer, although from his decision it would seem that the Roman law would be adopted. In that case all that was decided was that an issue *devisavit vel non* cannot be had to prove whether a testator was laboring under a mistake as to the legitimacy of his child, for if it did revoke the will, it was only *pro tanto* and it would be a claim against the estate on the filing of the account. As to this see, also, *Doane v. Lake*, 32 Me. 268. Judge Sharswood cites the case in Cicero's Oration, I C. 38. where a father gave an estate to a stranger under the mistaken belief that his son was dead, and it was

<sup>1</sup> 1 Brewster, p. 159.

held that the son would be instituted in his place. He also cites Swinburne on Wills, p. 395, where the rule is laid down that if the testator expresses a false cause, as because my son is dead thou shalt be executor, the disposition is of no force. From which it would seem that the Roman law would be adopted. In *Kendall v. Abbott*, 4 Ves. Jr. \*p. 802 (1790), where a legacy was given to a man as husband, a character which he had falsely assumed, it was held that the civil law would be adopted; but it would seem that in that case the reason for adopting it was the fraud. A similar case arose in *Wilkinson v. Johnson*, L. R. 2d. Eq. 319 (1866), and the same conclusion was reached. Lord Mansfield, in *Brady v. Cubit*, Doug. 30 (1778), cites Cicero's case, and there is a dictum in *Gordon v. Gordon*, 1 Mer. 141 (1816), to the same effect.

There seems to be no doubt that where a will is revoked under a mistake of fact the revocation can be set aside. The principle is stated in Williams on Executors, p. 147, and in numerous cases. In the case of *Doe v. Evans*, 10 Adol & Ellis, 228 (1839), the testator devised land to L with remainder to his first and other sons and daughter. L died, and his son died and left a posthumous daughter whose existence was not known to the testator when he revoked the will, reciting the death of L without issue. Held to be only a conditional revocation, the testator having become acquainted with its existence before his death. [See also *Campbell v. French*, 3 Ves. \* 321 (1787)].

In *Mendehall's Appeal*, 124 Pa. 387 (1889), the principal as stated was adopted in this state, and it was held that a codicil which revokes a will, if made under a mistake of fact, is void generally. But it modified the rule to suit that case, and held that where the falsity of the alleged fact rested on the personal knowledge of the testator it would not revoke the codicil. In that case the testator revoked a devise by a codicil because of a gift to the legatee in his lifetime, and it was shown that there was no gift, but it was held the codicil would stand. That case carries out the theory that it is the intention of the testator which will be considered in revocation of a will, and when the

falsity is something which he could have known all about, it is presumed the full facts are known to him.

The reason given for the rule that a revocation made by mistake can be set aside is, that it is a conditional revocation and when the condition fails the revocation fails. It may be argued, however, that a revocation under a mistake of facts is in no way similar to a making of a will under a mistake, and that a will is ambulatory during the life of the testator and contingent on his death, but a revocation takes effect immediately: § 2, Hare & Wallace Leading Am. Cases, 517. Further, the destruction or cancellation of a will under statute is only *prima facie* evidence of revocation and may be rebutted by proof of a mistake for that reason: 2 Hare & Wallace, 501.

But why is not the operation of the will conditional on the truth of the reason for the devise in it, in the same manner that the revocation of a will is conditional? It may be said that the Wills act has provided in what manner a will can be revoked and a mistake of fact is not one of the ways provided by statute, and that a will cannot be revoked by word of mouth or subsequent circumstances unless the circumstances amount to a revocation at law.<sup>1</sup> Further, that parol evidence *dehors* the will cannot be admitted to prove a mistake or to show that the testator intended to dispose of his property differently,<sup>2</sup> and that the mistake must appear on the face of the will as already stated.

First of all, it must be remembered that a mistake in a contract or a will does not make it void, but equity will rectify the mistake,<sup>3</sup> and that the will is not really revoked by the mistake but only corrected to suit the intention of the testator, which is what *pro tanto* revocation is.

And, second, that although when a testator gives his property to A, and a false reason is found on the will, or can be gathered from it, although the mistake does not appear on the face of the will, as soon as the facts as stated or reason as

<sup>1</sup> Rothmaler v. Meyers, 4 Dessaus, 215; Flinthan v. Bradford, 10 Pa. 82; Williams v. Freeman, 83 N. Y. 561; Lewis v. Lord, 2 W. & S. 455.

<sup>2</sup> Wallize v. Wallize, 55 Pa. 242; 1 Redf. 499; Avery v. Chappel, 6 Conn. 270.

<sup>3</sup> Avery v. Chappel, 6 Conn. 270.

given is shown to be false, the mistake appears on the face of this will, and in *Durham v. Avery*, 45 Conn. 61 (1877), it is said that "it is the reason that must appear on the face of the revocation, where it is sought to set the revocation aside for a mistake of fact," and it is a rule that where a testator founds his revocation on his advice or belief merely instead of making the death of the legatee (when he was not dead) the reason of the revocation, it will stand.<sup>1</sup>

The case of *Gifford v. Dyer*, 2 R. I. 99 (1852), is a very near case to that of Cicero. In that case a testator made a will under a mistake as to the supposed death of her son, but the reason for the devise, viz., the death of the son, did not appear in the will itself. It was held that the mistake must appear on the face of the will, and it also must be shown on the will what it would have been but for the mistake. In *Bramby v. Haines*, 1 Lees' Cases, 120 (1833), it was held that where a woman made a will describing herself as a widow on the presumption that her husband was dead, that it would be revoked if he were not dead. So that a false reason revokes the devise.

Further, it must be remembered, that there is no material difference in principle between the rules for interpretation of wills and contracts,<sup>2</sup> and in Pennsylvania parol evidence to show the inducement under which a contract is entered into is admissible.<sup>3</sup> From which it would seem that the inducement under which a will is executed might be shown by parol evidence. But the courts, from the cases already cited, will not allow evidence of intention of the testator to be given generally, and it is therefore doubtful, even if the intention amounts to an inducement, whether the court will allow it to be given. But where the intention of the testator appears on the face of the will in the reason given, the intention is not altered in any way by showing the reason to be false, for the condition is part of the intention.

Therefore, it would seem that a devise should be set aside

<sup>1</sup> *Atty. Gen. v. Lloyd*, 3 Atl. 552; *Atty. Gen. v. Ward*, 3 Vea. 327; 1 *Jar. Perkin's Note*, 166.

<sup>2</sup> *Greenleaf, Evidence*, § 287; *Stephen on Evidence, Note*, p. 161.

<sup>3</sup> *Greenwalt v. Kline*, 85 Pa. 369.

by the mistake of the fact at the time the will is executed, and the subsequent discovery of the mistake need not enter into the question, and we have seen that, under the parol evidence rule, the ground on which the mistake is shown is that it was a conditional devise, and when the condition fails the devise fails.

Where the testator subsequently discovers, and by another writing corrects his mistake, the case is much strengthened, for then the question of a change of circumstances in the family arises, and under *Young's Appeal*, 39 Pa. 115 (1861), it would seem that there would be a *pro tanto* revocation, since whenever there is a change of circumstances in the family of the testator which imposes on him a new moral duty, the will is revoked. Which case follows the Roman principle.

It is very doubtful whether the subsequent discovery, say of the existence of a child, is a sufficient change of circumstances to revoke a will by itself at common law, and in *McCullough's Appeal*<sup>1</sup> it was decided that the Wills act only applied to "physical birth," so that there could be no recovery under the statute. The case of *Ordish v. Dermott*, 2 Redfield (N. Y.) 460 (1877), would seem to be in point. In that case it was held that a will made in ignorance of the existence of a living child is not revoked by its discovery. That case rested entirely on the principle that the birth of a child was not of itself, without marriage, a sufficient change of circumstances to revoke a will, according to the well-known rule of common law.

The theory expressed in *Young's Appeal*, therefore, seems inconsistent with the common law theory that marriage and birth are both required to revoke the will.<sup>2</sup> And it is difficult to see why the Roman law should be adopted.

In conclusion it would seem that a will executed under a mistake of fact should be revoked if the reason for the devise appears on the face of the will. Further, that the proper method for the question to arise is not at the probate of the will since revocation is *pro tanto*, and mistake is unlike fraud, in that the latter will revoke the entire will, while the former comes to the court of equity merely for correction.

*John Lawrence Wetherill.*

<sup>1</sup> 115 Pa. 247; also *Campbell v. Jamieson*, 8 Pa. 488.

<sup>2</sup> *Williams on Exe'r*, p. 241.

## A VIEW OF THE PAROL-EVIDENCE RULE.— PART II.

§ 7. *Integration by Requirement of Law.* The process of Integration, from which it results that the terms of a particular transaction are to be sought only in a written memorial, is one dependent usually upon the intent of the parties. If they have willed that a certain writing shall exclusively be and represent their act, then the court will so treat it; if they have not so willed, then the court will resort to any negotiations that may have occurred, and to any dealings, whether oral or written, to ascertain and piece together the total of terms of the act. But there is another case in which the court may decline to consider sundry acts and dealings as furnishing the terms of a legal act, and may confine itself solely to a single written memorial; and that is where by provision of law the act is to be valid only when it is transacted in the shape of a single written memorial. When the law has provided that the only way in which an act may be given legal significance or existence is by doing it, and all of it, in writing, then no other conduct or dealings, purporting to be such an act, can be considered, and evidence of them is, of course, inadmissible because tending to prove an immaterial *factum probandum*. The difference between the effect of non-integration of this sort and of the preceding sort is that, in the former case (integration by intent of the parties), resort to parol<sup>1</sup> transactions is forbidden only when the parties have by intention made the single writing the exclusive memorial; and if they have not, then resort may be had to parol transactions if any occurred; while in the latter case (integration by requirement of law) resort to parol transactions is absolutely forbidden,<sup>2</sup> so that if the act has not been integrated in writing as required, a trans-

<sup>1</sup> By "parol," in connection with the present principle is properly meant, not merely oral utterances, but also informal writings, *i. e.*, writings (letters, memoranda, etc.) other than the single and final written memorial; see *ante*, § 1.

<sup>2</sup> There is one apparent exception, to be noted later.

action in parol will still be of no significance for the purpose in hand.

The cases in which, by requirement of law, there must be an integration in writing, are of two general sorts: (1) certain acts by ordinary persons, creating, transferring, and extinguishing rights and obligations; (2) proceedings by judicial and other officers.

(1) In only a few instances does a requirement of law prescribe that an act, to be valid, must be reduced to writing; the genius of our law being contrary to that of the Continental law in this respect. Almost universally such a requirement is made for wills of realty;<sup>1</sup> in most jurisdictions the requirement extends to wills of personalty also; in probably all jurisdictions an exception exists for oral (nuncupative) wills by soldiers and sailors in service, and, sometimes, by persons on a deathbed or during a journey.<sup>2</sup> In most jurisdictions, also, grants of realty are required to be reduced wholly to writing. The requirement of a memorandum of certain data in a transaction of sale, provided for in the fourth and seventeenth sections of the Statute of Frauds, is to be distinguished from a requirement of the above sort; that which the statute requires is merely an accompanying or collateral written memorandum of some parts of the transaction;<sup>3</sup> it thus differs in the two important respects that an oral contract of sale may exist independently of the memorandum<sup>4</sup> (whereas the written will, and nothing else, is the testamentary act), and that only certain parts of the transaction need be noted in the memorandum (whereas the written will must contain every part of the testamentary act).

(2) It has long been a principle of our law, irrespective of any statutory requirement, that the proceedings of a court exist and are to be found only in the "record." Precisely what the "record" is has been the subject of many detailed rulings and

<sup>1</sup> See Jarman on Wills, 6 Am. ed. 76.

<sup>2</sup> See Jarman, *ubi supra*, 784.

<sup>3</sup> See Browne, Statute of Frauds, cc. 17, 18.

<sup>4</sup> So that, for example, the memorandum may be made after the actual contract of sale.



much statutory regulation; but the general notion conceives it as the final enrolment or written expansion of all the proceedings in a litigation, made by the clerk or the judge, and verified by the judge.<sup>1</sup> This "record" is, in legal theory, not a testimonial report by the officer of the proceedings, nor a copy of some other written act; it *is* the proceeding and the act itself.<sup>2</sup> Nothing that is not in this record is a legal act or a part of the proceedings; what is not in the record has not been done; and, consequently, it cannot be shown that something was done which is not noted in the record, or that a thing noted in the record was in truth done differently. The principle applies, of course, only to such proceedings as properly form a component part of the proceedings; and hence transactions not properly forming a part of the record may be shown otherwise than by the record; and there is much learning as to the discriminations here necessary to be taken. Moreover, though in legal theory the record is the proceeding itself, nevertheless it is usually not prepared till an interval of time has elapsed after the actual oral proceeding, and in the meantime the clerk or the judge has, in a docket or a minute-book, made a temporary note of the various things done. Thus a question may arise as to the propriety of using the minutes to correct the record;<sup>3</sup> though even when this is allowed, the record is still in legal theory the proceeding itself, and stands effective until formally corrected. Thus, again, resort may be had to the minutes as representing and constituting the proceeding, where the record proper has been lost or destroyed or has never been made up;<sup>4</sup> and here occurs the

<sup>1</sup> See the nature and policy of the doctrine expounded in *Pruden v. Alden*, 23 Pick. 184; *Ward v. Saunders*, 6 Ired. 382; *Wells v. Stevens*, 2 Gray, 115.

<sup>2</sup> "The record is tried by inspection; and if the judgment does not there appear, the conclusion of law is that none was rendered:" *Nisbet, J.*, in *Bryant v. Owen*, 1 Ga. 355, 367.

<sup>3</sup> By making an entry *nunc pro tunc*; see *Jacks v. Adamson*, 56 Oh. 397; *State v. Feister* (Or.), 50 Pac. 561.

<sup>4</sup> "Until they can be made up, the short notes must stand as the record:" *Pruden v. Alden*, 23 Pick. 184; "Minutes may be introduced as . . . in truth for the time being constituting the record itself:" *McGrath v. Seagrave*, 2 All. 443. Where the final record is lost, the minutes take its place: *Cook v. Wood*, 1 McCord, 139.

peculiar difference<sup>1</sup> between this kind of integration by law and the preceding kind ; for in the case, for example, of a will, if no will in writing exists, no oral or other informal attempt at a will may take its place ; while, if a record has not been made up, the provisional minute-book or docket is treated as representing the proceeding.

There are but few other official proceedings which are treated, after the analogy of judicial records, as constituted solely in and by the official writing. The principle is sometimes applied to the records of a public corporation ;<sup>2</sup> and is usually applied to the journals of a legislature. The acknowledgment by a married woman that she signs a deed of her own free will is in many jurisdictions treated as a judicial proceeding, and the official certificate can thus not be shown to be incorrect ; but other views have often (sometimes by express statute) prevailed.<sup>3</sup> The registration of a deed is usually regarded as merely the preservation of an official copy of the original and effective document ;<sup>4</sup> but, perhaps, under the recent improved systems of transfer the official registry may be treated on the principles of judicial records.<sup>5</sup> To be distinguished from the principles applicable to judicial records is a principle not infrequently treated as equivalent, by which an

<sup>1</sup> See note, *ante*.

<sup>2</sup> See *Saxton v. Ninnus*, 14 Mass. 315 ; *Thayer v. Stearns*, 1 Pick. 109 ; *Roland v. District*, 161 Pa. 102, 106. But there is sometimes a difference, in that oral proceedings can be shown if no record was made : *Boggs v. Ass'n*, 111 Cal. 354 ; *Zalesky v. Ins. Co.*, 102 Ia. 512 ; *contra*, *Taylor v. Henry*, 2 Pick. 397.

<sup>3</sup> One view is that the certificate is conclusive except as to appearance or jurisdiction in general ; another, that it is impeachable only for fraud or, perhaps, for mistake ; another, that it may be contradicted on any point ; see the various views represented in *Elliott v. Peirsol*, 1 Pet. 328 ; *Edinb. R. L. M. Co. v. Peoples*, 102 Ala. 241 ; *Woodhead v. Foulds*, 7 Bush, 222 ; *Dodge v. Hollinshead*, 6 Minn. 25, 39 ; *Davis v. Howard*, 172 Ill. 340 ; *Harkins v. Forsyth*, 11 Leigh, 294.

<sup>4</sup> See *Harvey v. Thorpe*, 28 Ala. 250 ; *Gaston v. Merriam*, 33 Minn. 271 ; *Fleming v. Parry*, 24 Pa. 47 ; *Hastings v. B. H. T. Co.*, 9 Pick. 80 ; *Ames v. Phelps*, 18 Pick. 314 ; *Jones, Real Property*, § 1475 ; so also as to its non-conclusiveness in regard to the time of recording : *Bartlett v. Boyd*, 34 Vt. 256 ; *Horsley v. Garth*, 2 Gratt. 371, 391.

<sup>5</sup> See articles in 6 Harv. L. Rev. 302, 369, 410 ; 7 *id.* 24.

official's report or certificate of an act done before him by a person wishing to do a legal act is treated as conclusive testimony to the nature of the act done. There are but few well-established instances of this; the chief one being the magistrate's report, as required by many statutes, of the statement of an accused person examined before him;<sup>1</sup> here the real process seems to be the making of a specific witness' testimony conclusive.<sup>2</sup>

§ 8. *Parol-Evidence Rule applicable only between the Parties.* It is usually said that the parol-evidence rule is applicable only between the parties. That this is correct, for many purposes at least, may be seen by noticing the principle of the rule so far as the integration was made by intent of the parties. Their determination is that, for the purposes of consti-

<sup>1</sup> There are many other instances in which such a conclusive effect has been claimed but usually denied for an official certificate; for example, to a registration of birth (*Hermann v. State*, 73 Wis. 248); to an enrolment of recruits by a military officer (*Wilson v. McClure*, 50 Ill. 366); to a notarial certificate (*Wood v. Trust Co.*, 7 How. (Miss.) 309, 630; *Merrill v. Syper* (Ark.), 44 S. W. 462); to the certificate of an oath-taking, or jurat (see *R. v. Emden*, 9 East, 437; *Thurston v. Slatford*, 1 Salk. 284; *Sherman v. Needham*, 4 Pick. 66).

<sup>2</sup> The feature superficially common to both principles is that it is forbidden to show that the thing was done other than as stated in the document. But the reasons for this identical result are not the same in both cases. In the case of a judicial record, the record is the proceeding; consequently nothing else may be consulted as constituting the proceeding. In the case of an official's report, the effective legal act is still what was done or said before him; and his writing is no more than a reporting or testifying to that act of another person; it is a preferred report and is conclusive, but it is still only a report. The practical difference is that, in the case of a magistrate's report, if it is for any reason not available (by loss or destruction, for example), it is sufficient to prove directly the oral statements of the accused by one who heard them, on the theory that when a preferred witness is unavailable, an ordinary witness will suffice; while in the case of a judicial record, if the record itself was never made, then the proceeding cannot be proved at all (as well expounded by Hubbard, J., in *Sayles v. Briggs*, 4 Metc. 421), and if it was made but is lost, then the proof would be, not of the oral doings, but of the record's contents (*Mandeville v. Reynolds*, 68 N. Y. 528, 533); and where by statute the resort to oral doings is allowable in order to restore lost records, it is in legal theory, not the substitution of one kind of testimony for another, but the re-constitution, by compilation, of the judicial act itself.

tuting a certain legal act of theirs, a particular writing shall alone be consulted; but, so far as concerns their relations to other persons, their conduct and utterances extrinsic to that writing may still be considered, so far as such data are not treated as part of that act but become material for some other purpose. For example, where the issue is as to adverse possession of a right of way, the deed not reserving such a right, a conversation between grantor and grantee, the former conceding the way, would be receivable as affecting the adverse nature of the grantee's possession;<sup>1</sup> so also a creditor, claiming to set aside a mortgage as fraudulent, could show, as evidence of fraud, the debtor's oral agreement with the mortgagee;<sup>2</sup> so, also, in a criminal prosecution for embezzlement, in which the intent is the material issue, an oral promise by the employer to allow certain sums to the employe, could be shown, in spite of the terms of the written contract between them.<sup>3</sup> Where the integration is required by law, the same consequence may follow; thus, on an issue as to the contents of a lost will or of undue influence, the testator's normal testamentary intentions being admissible in evidence, oral statements of intention, or a will not duly executed, or a will not proved by the attesting witnesses,<sup>4</sup> could be used as showing the testamentary intention; since here there is no attempt to use the utterances as having testamentary effectiveness. The truth seems to be, then, that the rule, as regards others than the parties to the act, does not exclude extrinsic utterances so far as they are for any purpose admissible; but that even for other parties, it would still apply to exclude, where the object was to show the terms of the act as the effective transaction between the parties. Nevertheless, it is common to say, without qualification, that the rule applies only in suits between the parties.<sup>5</sup>

<sup>1</sup> 1 *Ashley v. Ashley*, 4 Gray, 197.

<sup>2</sup> *Jewett v. Sundback*, 5 S. D. 111, 119.

<sup>3</sup> *Walker v. State* (Ala.), 23 So. 149; compare *Re Clapton*, 3 Cox Cr. 126.

<sup>4</sup> *Demombreun v. Walker*, 4 Baxt. 199.

<sup>5</sup> For other instances, see *Dunn v. Price*, 112 Cal. 46; *Roof v. Pulley Co.*, 36 Fla. 284; *Kellogg v. Thompson*, 142 Mass. 76; *Plainfield F. N. B'k*

§ 9. (II) *Interpretation of Legal Acts.* Assuming that a legal act has been consummated (whether it has or has not been integrated), a peculiar situation and a new set of questions are presented when the act comes before the courts for enforcement. The process of realizing, enforcing, or giving objective effectiveness to the party's act involves the application of the terms of the act to external objects so as to carry out and make good, by process of law, the results prescribed by the act. Assuming that there is no legal objection to this realization of the act, then the sole aim of the court is to ascertain the significance of its terms, or, in other words, the associations or connections between the terms of the act and the various possible objects of the external world. The process of fulfilling this aim is the process of Interpretation. In order to understand the questions which it presents, two fundamental distinctions must be noticed at the outset: (1) the distinction between the intention of the party and the meaning of his words; (2) the distinction between various standards of meaning, *i. e.* individual, mutual, and customary meaning.

(1) The distinction between "intention" and "meaning" (quite apart from any dispute as to the propriety of these names) is vital. Interpretation as a legal process is concerned with the meaning of words and not with the intention of the one using them.<sup>1</sup> It is commonly said, as explaining the pro-

*v. Dunn*, 57 N. J. L. 404; *Libby v. Land Co.* (N. H.), 32 Atl. 772; *Hankinson v. Vantine*, 152 N. Y. 20; *Johnson v. Portwood*, 89 Tex. 235; *Signa Iron Co. v. Greeve*, U. S. App., 88 Fed. 207.

<sup>1</sup> This distinction and the above canon, insisted upon by many judges (*e. g.* Lord Denman, C. J., in *Rickman v. Carstairs*, 5 B. & Ad. 663: "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used") and by Sir J. Wigram, in his treatise on "Extrinsic Evidence in Aid of the Interpretation of Wills," has been acutely and strenuously denied by F. V. Hawkins, Esq., in his paper "On the Principles of Legal Interpretation" (2 Jurid. Soc. Papers, 298; reprinted in Professor Thayer's "Preliminary Treatise on Evidence," App. C); Mr. Hawkins calls the above principle "a fallacy of no small importance," since interpretation is mainly "a collecting of the intent from all available signs or marks." Nevertheless, it would be possible to show that the fallacy, on the contrary, lies in not recognizing this principle; and its recognition seems to enable us better to understand the actual rules of law; see the discussions in Leonhard, *Das Irrthum bei nichtigen Vertragen*, referred to *ante*, § 2.

cess, that the words are symbols, and that the object of interpretation is to ascertain the meaning of the symbols. But it is here still open to believe that in ascertaining the "meaning" of the symbols we are endeavoring to ascertain the state of the party's mind as fixed upon certain objects; and we are thus relegated once more to his mental condition as the ultimate object of the investigation. This mode of defining the process is likely to mislead, because the private intent of the party is constantly found to be excluded by the law from consideration, and it is difficult to reconcile this prohibition with the theory that interpretation aims ultimately to ascertain intention. Perhaps a better notion of the distinction between intent and the meaning of words may be obtained from the analogy of other illustrations. Suppose a vessel coasting the shore and entering various harbors where the government maintains a uniform system of harbor-buoys of various colors and shapes, indicating respectively channels, sandbars, sunken rocks, and safe anchorages; here the significance of each kind of buoy is known to be the same in every harbor under government control. But suppose the vessel to enter a harbor or inlet under the control of an individual or a city having a peculiar and different code of usage for the buoys; here it is immaterial whether a red buoy under the government system signifies a channel or a sandbar; the vital question for the vessel now is what a red buoy signifies under the code of the local authority, and all other systems of meaning are thrown aside as useless. This illustrates that though, in interpreting a party's (*e. g.* a testator's) words, we are concerned with *his* individual meaning, as distinguished from the customary sense of words, still we are not dealing with his state of mind, but with the associations affixed by him to an expressed symbol as indicating to others an external object. That is to say, the local harbor authorities may have "intended" to put a green buoy instead of a red buoy, or to have put the red buoy at another spot, just as the testator may have intended to use other words; but in both cases the state of mind as to intention is a wholly different thing from the fixed association, according to that individual's standard, between the expressed

symbol and some external object. To illustrate another aspect of the subject, suppose a game, *e. g.* of chess, to be played by B with his guest A. If the two are of the same nation, their standards—*e. g.* as to the shape of each chessman, the allowable moves, and the effect of a move—will be the same. But some nations differ from others in one or more of these respects; so that if, for example, B's national rules allowed a rook to threaten diagonally on the board, A as guest would accept and accommodate himself, as best he might, to this standard of operation. But, though this much might be conceded to B as host, in the adoption of his standards for giving effect or meaning to his acts of moving the chessmen, yet it would remain true that his private intent or state of mind, as distinguished from the significance of his acts of moving, would be immaterial; so that, for example, his intent to have touched and moved a different piece, or to have placed the piece on a different square, would not be taken into consideration. In the same way, the process of interpretation may concern itself with the individual significance of a testator's words as associated by his standards with specific objects, but it may at the same time refuse to concern itself with the state of mind that led up to the use of those words.<sup>1</sup> On the one hand, then, is to be noted the distinction between "intention" (or state of mind at the time of acting) and "meaning" (or the association between specific words and external objects). The process of interpretation may best be thought of as the tracing and ascertainment of this association.

(2) In this process of ascertainment, whose standard of meaning shall be taken? The standards may be different, according as the transaction is a unilateral or a bilateral one. Where effect is to be given to the act of a single person—for example, a testator—there is no reason why his individual standard of usage should not be employed; for example, if he names a house on "Maple Place," the words are to be applied to the locality habitually associated by him with that

<sup>1</sup> The law might conceivably choose to give effect to the intention; it does rarely, as in the case of reformation for mutual mistake; why it usually does not is noted in the next section.



term, even though that locality is commonly designated as "Maple Street."<sup>1</sup> But if the transaction is one in which another person has shared (as a deed or contract) so that the other person has acted on the faith of a certain meaning to the words, then the standard must be enlarged; it is not to be the individual standard of the first party, but the standard which the other party was reasonably justified in acting upon,—primarily and usually, the standard common to other persons generally, but, secondarily and peculiarly, the particular standard of the second party, if that should differ from the standard of the community and still be a reasonable one. It follows (1) that the individual meaning or sense used by the first party alone is in itself immaterial;<sup>2</sup> (2) that the sense to be taken is that which the other party was by universal usage in the community justified in attributing to the words; (3) that provided both parties are acquainted with a special (usually a commercial) usage, which would naturally apply to the case in hand, the term may be interpreted according to that special usage;<sup>3</sup> (4) that where the first party employs the term in an individual sense, which differs from the general sense, but is nevertheless known to the second party to be attached to the term, the second party is not entitled to invoke the general standard, but must be content with an enforcement according to this individual sense.<sup>4</sup>

§ 10. *Same: General Principle of Interpretation.* In this process of ascertaining the association between specific words, as used by the person acting, and external objects, a large

<sup>1</sup> For the supposed rule against disturbing a clear meaning, see *post*, § 12.

<sup>2</sup> *Fox v. R. Co. v. Conn.*, 38 Atl. 871; *Gamble v. Mfg. Co.*, 50 Nebr. 463; *Rickerson v. Ins. Co.*, 149 N. Y. 307; *Fudge v. Payne*, 86 Va. 306; *Anderson v. Jarrett*, 43 W. Va. 246. The case of an ambiguity, in which each party's sense is a reasonable one (*Raffles v. Wichelhaus*, 2 H. & C. 906, "ex Peerless"), rests on peculiar grounds.

<sup>3</sup> See *Armstrong v. Granite Co. (Ill.)*, 42 N. E. 186; *Eaton v. Gladwell*, 108 Mich. 678; *Rickerson v. Ins. Co.*, 149 N. Y. 307. These cases illustrate that the usage must be in fact known to the other party, or so general that it was probably known to him.

<sup>4</sup> For the application here of the supposed rule against disturbing a clear meaning, see *post*, § 12.

field of investigation is opened. So far as concerns the implications of the process itself, it is natural, and it may be accepted as a legal principle, that all sources of information should be consulted. The circumstances amid which the person lived and acted, his usages as to words and phrases, his conduct and expressions, may all furnish data throwing light upon his association of specific objects with specific words and phrases,—*i. e.* upon the meaning of such words and phrases. “To understand the meaning of any writer we must first be apprised of the persons and circumstances that are the subject of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words.”<sup>1</sup> “The court has a right to ascertain all the facts which were known to the testator at the time he made the will, and thus to place itself in the testator’s position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied.”<sup>2</sup> “To get at the intention expressed by the will, . . . as a will must necessarily apply to persons and things external, any evidence may be given of facts and circumstances which have any tendency to give effect and operation to the will—such as the names, descriptions and designations of persons, the relations in which they stood to the testator, the facts of his life, as having been single or married one or more times, having had children by one or more wives, their names, ages, places of residence, occupations; so of grandchildren, brothers and sisters, nephews and nieces, and all similar facts; and the same kind of evidence may be given of all facts and circumstances attending the property be-

<sup>1</sup> Lord Abinger, C. B., in *Doe v. Hiscocks*, 5 M. & W. 363.

<sup>2</sup> Lord Cairns, L. C., in *Charter v. Charter*, L. R. 7 H. L. 364.

queathed, its name, place and description, as by its former owner, present occupant, or otherwise.”<sup>1</sup> “The general rule is that in construing a will the court is entitled to put itself into the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will.”<sup>2</sup>

There is thus, so far as the natural suggestions of the process of interpretation are concerned, a “free and full range among extrinsic facts in aid of interpretation.”<sup>3</sup> But are there any limitations upon this range of search, other than the ordinary rules as to the admissibility of evidence? It is not easy to trace and distinguish the various elusive shapes taken by certain supposed rules of limitation. But those that have, in one shape or another, received effect, correctly or incorrectly, seem reducible to three general rules: (1) a rule against using declarations of intention; (2) a rule against disturbing a clear meaning, and (3) a rule against correcting a false description.<sup>4</sup>

§ 11. *Same: (1) Rule against using Declarations of Intention.* An established rule, never questioned, is that, for the purpose of interpretation, declarations of intention are not to be consulted. The reason is not that such declarations can-

<sup>1</sup> Shaw, C. J., in *Tucker v. Seaman's Aid Society*, 7 Met. 188.

<sup>2</sup> Blackburn, J., in *Allgood v. Blake*, L. R. 8 Ex. 160.

<sup>3</sup> Thayer, *Preliminary Treatise*, 414.

<sup>4</sup> Nothing will here be said about Lord Bacon's distinction (*ante*, § 297) between “patent” and “latent” ambiguities; this “unprofitable subtlety” which “still performs a great and confusing function in our legal discussions,” in spite of the repeated exposures of its inutility as a working rule, has been fully disposed of in Professor Thayer's “*Preliminary Treatise*,” pp. 422, 471.

The limitations noted *ante*, § 9, as to employing usage to interpret contracts or deeds, are to be understood as additional to those above mentioned; but they do not flow from the nature of data that may be consulted, so much as from the standard controlling the entire process of interpretation. Where a unilateral act is to be interpreted, the standard or object is the sense employed by the single actor; where a bilateral act is to be interpreted, the standard is primarily the joint sense of the two parties; and the special limitations applicable in the latter case are thus outside of and preliminary to the further limitations now to be noted.

not throw light upon the application of the words; for they might conceivably do so; but that their chief and overshadowing function and effect would be to set up a rival declaration of volition, coming directly into competition with the words of the document which alone is to be regarded as the legal act. Thus, where a will provides for a bequest of the testator's library to his cousin James, an oral declaration of his "I want my nephew William to have my library," while conceivably it might with other facts help out a disputed interpretation, would be likely to have the paramount effect, if considered, of overturning the words of the will and substituting, as that part of the testamentary act, a declaration not in itself available as a testamentary act; in other words, it violates the rule of Integration already examined.<sup>1</sup>

To this rule of limitation there is one exception well set-

<sup>1</sup> In the case of wills, such declarations are excluded "upon this plain ground, because his will ought to be made in writing" (Lord Abinger, C. B., in *Doe v. Hiscocks*, 5 M. & W. 363; so also Shaw, C. J., in *Tucker v. Seaman's Aid Society*, 7 Met. 188); in the case of contracts and deeds, because the parties by intention made the writing the sole memorial of the act, and further, because one party's intention or sense is immaterial. If we could suppose that a will were not required to be in writing and signed, it would seem that various declarations of testamentary intention might be consulted for the purpose of determining which was the effective testamentary act and what its tenor. Moreover, wherever the actual intent or state of mind may, by the Integration rule, be looked to for the purpose of invalidating or reforming a supposed act (as in reformation of a deed for mutual mistake—*ante*, § 3—or in those cases where a testator's mistake as to the contents of a will may be shown—*ante*, § 3), it would seem that declarations of intention could be considered. So that the exclusion of such declarations in the process of interpretation seems to be explainable, not as a rule of evidence affecting interpretation, but as the consequence of the rule, already treated, about integration or parol-evidence. Professor Thayer has expressed the view (*Preliminary Treatise*, 414) that it is "usually and rightly regarded as an excluding rule of evidence;" though he elsewhere (p. 144) concedes that it "partakes of the character of both" a rule of evidence and a rule of construction; yet the suggestion of Lord Abinger, *supra*, that it is a consequence of the general rule excluding utterances which compete with the writing, seems preferable.

Distinguish the use of ante-testamentary declarations of a testator as showing the probable contents of the will as ultimately executed; here there is no attempt at interpretation nor at setting up declarations to compete with conceded contents.

tled, and another once prevailing but now generally repudiated.

(a) Where an object is described in terms equally applicable to two or more objects, the testator's declarations specifying the particular one signified are admissible; as in the often-used illustration, if one devise his manor of S. to A. B., and he has two manors, North S. and South S., "it being clear that he means to devise one only, whereas both are equally denoted by the words he has used."<sup>1</sup> This is the situation ordinarily known as "equivocation;"<sup>2</sup> and the exception is unquestioned.<sup>3</sup> The same principle may be applied to contracts and deeds, so as to admit the understanding of the parties, though expressed independently of the document, as to the application of ambiguous words or phrases.<sup>4</sup> (a') Where a blank occurs, the exception does not ordinarily apply to admit such declarations; because the blank will usually indicate a deliberate non-exercise of testamentary or contractual action on that subject in the document, and so the use of other declarations to supply the blank would in effect violate the rule of integration, already described, requiring the terms of the act

<sup>1</sup> Bacon's Maxims, R. 25; Lord Abinger, C. B., in *Doe v. Hiscocks*, 5 M. & W. 363.

<sup>2</sup> Here the declarations are not obnoxious to the parol-evidence or integration rule, because they do not compete for effect with any terms of the writing, and thus their interpretative force, as showing the significance of the words "manor of S.," can be given full play without the danger of contravening that rule; this is the explanation of Parke, B., in *Doe v. Needs*, 2 M. & W. 129: "The words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects to which the description in the will applies and to determine which of the two the deviser understood to be signified by the description which he used in the will;" see the same language adopted by Bigelow, C. J., in *Bodman v. American Tract Society*, 9 All. 447.

<sup>3</sup> The Lord Cheney's Case, 5 Co. 68 b (on a devise "to his son John generally," it might be shown "that he, at the time of the will made, named his son John the younger.")

<sup>4</sup> *Diggs v. Kurtz*, 132 Mo. 250 (deed of "lot No. 312," not naming boundaries or plat; oral agreement admitted); *Maynard v. Render* (Ga.), 23 S. E. 194 ("cords" of wood; mutual understanding as to a cord's length admitted).

to be sought in the written memorial alone.<sup>1</sup> But where the blank indicates merely the party's ignorance of the complete description and not a failure to make a definite act or transfer, the situation is the ordinary one of an equivocation.<sup>2</sup> (a'') Where a gift is to one or more than one of a class, the situation may be equivalent to that of a blank—*e. g.*, a devise to "A and B and heirs," or to "one of the sons of C," or to "my nephew D or E;" for here there is a failure to complete the testamentary disposition.<sup>3</sup> But, on the other hand, it may be in effect a definite disposition giving an election to some donee to choose out of a class of objects; here the gift is not void for uncertainty.<sup>4</sup> (b) Where the terms of the will are not applicable to any object, *i. e.* where the description "is true in part but not true in every particular—as where an estate is devised called A, and is described as in the occupation of B, and it is found that though there is an estate called A, yet the whole is not in B's occupation, or where an estate is devised to a person whose surname or whose Christian name is mistaken, or

<sup>1</sup> In the following instances the declarations were not admitted: *Hunt v. Hort*, 3 Prec. Ch. 311 ("to become the property of Lady "); *Baylis v. Attorney-General*, 2 Atk. 237 (money given "according to Mr. — his will"). It may be noted that this situation may occur even where the document does not contain what could be termed literally a blank; for example, where a will contained a list of devisees indicated by successive letters, K, L, M, etc., and provided that "the key and index to initials is in my writing-desk," but the key to the cipher was dated eight years later than the will; this was excluded, because the will was in effect unfinished when executed, and the subsequent key was not a valid testamentary act. On this principle the following case may be questionable: *Dennis v. Holsapple*, 148 Ind. 297; devise to "whoever shall take care of me and maintain, nurse, clothe and furnish me, etc., during the time of life yet when I shall need the same;" the claimant was allowed to show that she fulfilled this description, and that the testatrix had in asking her aid, referred to the above provision.

<sup>2</sup> This was the case in the following instances: *Price v. Page*, 4 Ves. Jr. 679 (bequest to "Price, the son of Price"); *Marske v. Willard*, 169 Ill. 276 (lease of "lot No. —, in assessor's subdivision of Whiting's Block, No. 8").

<sup>3</sup> *Altham's Case*. 8 Co. 155; *Strode v. Russell*, 2 Vern. 621.

<sup>4</sup> *Bacon, Maxims*, Rule 25; though it would apparently not be a case of equivocation where declarations could be used.

whose description is imperfect or inaccurate,"<sup>1</sup> there seems no reason against using declarations of intention; because their effect is not to compete with the terms of the will, but merely to aid in determining which is the essential part of the description and which the non-essential part. The description had a definite sense for the testator, but some part of it has to yield, being inaccurate, and the only effect of the declarations can be to aid in applying the description as used by the testator. That declarations of intention are in such a case admissible, may fairly be said to have been once the law in England;<sup>2</sup> but subsequent rulings have rejected such evidence.<sup>3</sup> In the United States the evidence has sometimes been received.<sup>4</sup>

*John H. Wigmore.*

(To be continued.)

<sup>1</sup> Tindal, C. J., in *Miller v. Travers*, 8 Bing. 244.

<sup>2</sup> *Thomas v. Thomas*, 6 T. R. 671 ("to my granddaughter, Mary Thomas, of L., in M. parish;" there was an M. T., but she was a great-granddaughter, and lived in another parish; there was an E. E., who was a granddaughter and lived in M. parish; declarations of intent made at the time of execution were held admissible); *Selwood v. Mildmay*, 3 Ves. Jr. 306 (bequest of stock "in the four per cent. annuities of the Bank of England;" the testator had only long annuities not four per cents; instructions to his attorney admitted); *Still v. Hoste*, 6 Madd. 192 (bequest to "Sophia S., daughter of P. S.;" P. S. had daughters, but none named Sophia; instructions to scrivener admitted); Tindal, C. J., in *Miller v. Travers*, quoted *supra*.

<sup>3</sup> *Doe v. Hiscocks*, 5 M. & W. 363 (to "my grandson, J. H., eldest son of the said J. H.;" J. H., the father, had a son S., the eldest by his first wife, and a son J. H., the eldest by his second wife; instructions and declarations excluded, almost solely on the authority of *Miller v. Travers*, *supra*; the decision thus rests on a direct misunderstanding); *Bernasconi v. Atkinson*, 10 Hare 345 (following *Doe v. Hiscocks*); *Drake v. Drake*, 8 H. L. C. 172, 175 (resting solely on *Doe v. Hiscocks*); *Charter v. Charter*, L. R. 7 H. L. 364 (by three judges; but Lord Selborne, one of them, added, "Why the law should be so . . . I am not sure that I clearly understand;" the preceding cases were held to control). Professor Thayer, *Preliminary Treatise*, 480, accepts this result as sound.

<sup>4</sup> The question has not often been discussed because of a tendency to ignore the distinction between declarations of intention and other evidence; *admitted*: *Covert v. Sebern*, 73 Ia. 564; *Lassing v. James*, 107 Cal. 348; *Gordon v. Burris*, 141 Mo. 602; *excluded*: *Eckford v. Eckford* (Ia.), 53 N. W. 344; *Judy v. Gilbert*, 77 Ind. 96; *Funk v. Davis*, 122 *id.* 281; *Ehrman v. Hoskins*, 57 Miss. 192.



## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ASSIGNMENTS FOR CREDITORS.

Following *Barth v. Backus*, 140 N. Y. 230, and *Townsend v. Cope*, 151 Ill. 62, it was held in *Security Trust Co. v. Dodd*, 19 Sup. Ct. 545, that an assignment for creditors, executed under a Minnesota statute which practically created an insolvent law by providing that only releasing creditors should share in the assigned estate, passed no title to property outside of the state as against an attaching creditor (even with notice) in another state.

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#### ASSOCIATIONS.

It has sometimes been argued that a by-law, under which a member of an association may be expelled without any opportunity for defence on his part, is illegal, and that any proceedings taken under such a law are of no legal effect. In *Berkhout v. Supreme Royal Arcanum*, 43 Atl. 1, the Supreme Court of New Jersey places a qualification on this rule, which is stated in the following words: "A by-law which provides for the expulsion of a member without affording him an opportunity of defending himself against the charges upon which his expulsion is based is not altogether null and void, but only so to the extent that it deprives such member of a hearing from which he might possibly derive a benefit; and where it conclusively appears that no such result has followed its enforcement, the existence of such a provision in it will not be held to invalidate the proceedings taken under it."

Applying this qualification to the facts of the case, the court sustained an expulsion under a by-law providing for a summary expulsion upon proof of the commission of a felony by a member; it appearing that, at the time of his expulsion, the complaining member was in prison for the crime, and a notice to attend the meeting of the inquiry committee could not possibly have been acted upon by him; moreover, since he had

ASSOCIATIONS (Continued).

confessed the commission of the crime in open court, the result of an inquiry by the committee in his presence would have necessarily been the same.

The first of these two reasons does not seem to be very strong, since even if the member could not have appeared personally, he might have been represented by his attorney.

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BANKRUPTCY.

*In re Camp*, 91 Fed. 745, determines some new points under the new bankruptcy law : (1) That it is the duty of the trustee, under § 47, to set apart his exemption to the bankrupt without reference to any action by state officials ; (2) That, following the Georgia decision, but apparently, also, with the court's own approval, a bankrupt partner is entitled to exemption out of the firm assets, provided, however, that upon an adjustment of the firm accounts it appears that he has any equity therein. The numerous conflicting decisions on the latter point are well collated.

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BANKS AND BANKING.

*Bank v. Dearing*, 91 U. S. 29, went a long way in the protection afforded to instrumentalities of the United States Government, when it held that national banks are not affected by the penalties of state usury laws. *Gadsden v. Thrush*, 78 N. W. (Neb.) 632, limits this privilege by deciding that the exemption from liability does not apply to a mortgage given to a third person to secure a usurious loan made by the bank.

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BILLS AND NOTES.

*Lindley v. Hoffman*, 53 N. E. (Ind.) 471, reminds us of an exception to the general rule that a blind man, who signs an instrument on the faith of hearing it read by another, is not liable to a *bona fide* holder for value if he has been deceived by a fraudulent and incorrect reading of the note. In this case the answer of defendant merely alleged that defendant was compelled to rely on the faith of the payee, who read the note to him, but it did not set forth any facts which showed that defendant might not have procured a disinterested person to read the note and acquaint him of its contents. For this reason the answer was held insufficient to rebut the inference of negligence on defendant's part.

## CARRIERS.

The Supreme Court of Pennsylvania has applied the relation of carrier and passenger to the following rather novel case: Plaintiff, who had taken passage on an electric car, purchased an exchange ticket to ride in another direction on defendant's line, and, on leaving the car, walked some distance to the junction where she was to take the connecting car. The latter arrived at the junction, and, since that was the end of its route, the seats and the trolley pole were reversed. Plaintiff had just left the pavement to take her seat in the car, when the pole, which was being pulled around, broke, and inflicted a severe injury upon her.

The court held as a matter of law that, while plaintiff might have ceased to be a passenger when she left the first car, yet that when she had left the pavement and was almost in the act of getting on the second one, she was, to all intents and purposes, within the custody of the defendant company and entitled to the rights of a passenger; therefore, in the absence of other evidence, a *prima facie* case of negligence against the defendant had been proved: *Keator v. Traction Co.*, 43 Atl. 87.

The Supreme Court of Vermont has added another to the many decisions holding that a printed notice on the back of a railroad ticket limiting the liability of the carrier does not constitute a contract between the carrier and the passenger. The question involved in such cases is that only of assent to the conditions. "Assent will not be presumed unless the proposed limitations are known by the passengers, and then much will depend upon whether they are reasonable or unreasonable. If not entirely reasonable, assent will not be presumed from knowledge merely, because the carrier, without such assent, is under the common law liability, and has the passenger at a disadvantage. The passenger's circumstances and necessities may be such as would compel him to assent to almost any conditions or limitations. Hence, when the conditions or limitations are not entirely reasonable, it is generally held that the assent to them will not be implied from a knowledge of them, but express assent must be established." In this case the condition was the familiar limitation of liability for wearing apparel to the value of \$100, and the evidence did not even establish the knowledge of plaintiff as to its existence: *Ranchan v. Rutland R. R. Co.*, 43 Atl. 11.

CONSTITUTIONAL LAW.

It seems rather unfortunate that laws made for the benefit of veteran soldiers so often fail of their object, generally because their enthusiastic framers forget the existence of the constitutions of the state and the United States. The Pennsylvania Act of May 26, 1897, P. L. 107, provided that Union soldiers occupying public positions should not be discharged without reasonable cause. Article VI, § 4, of the Constitution of Pennsylvania, provides that "appointed officers, other than the judges of courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall be appointed." When it was attempted to apply the above act to the case of a warden of a county prison appointed by the county commissioners, Judge Pershing intimated (although the point of the constitutionality of the act was not directly before the court, on account of an obscurely worded proviso) that the act was, in general, an attempt to nullify the discretionary power of removal given to the appointing bodies; and the fact seems plain. Judge Pershing's decision was affirmed *per curiam* by the Supreme Court, though this can scarcely be taken to be a definite ruling on the constitutionality of the act: *Brower v. Kantner*, 43 Atl. 7.

In *Loeb v. Trustees of Columbia Township*, 91 Fed. 37, the United States Circuit Court for the Southern District of Ohio has declared unconstitutional a statute assessing the cost of a road improvement upon the abutters by front foot. An assessment such as this, made without regard to special benefits, takes private property without due process of law. This decision follows the recent case of *Norwood v. Baker*, 19 Sup. Ct. 187, in which the Supreme Court of the United States, by a divided court (Gray, Brewer and Shiras dissenting), condemned assessment by frontage. Brewer, J., who dissented in the latter case on the ground that "it is, beyond question, a legislative function to determine the area benefited by such improvements, and the legislative determination is conclusive," is supported by Cooley, *Taxation*, 2d Ed., p. 644, *et seq.*, and Dillon, *Munic. Corp.*, 4th Ed., Vol. 2, § 752. *Ageus v. Newark*, 37 N. J. L. 416, and *Philadelphia v. Rule*, 93 Pa. 1 (1880), support the majority opinion.

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CONTRACTS.

In *Cooney v. Lincoln*, 42 Atl. 867 (Supreme Court of Rhode

## CONTRACTS (Continued).

Island), which was an action for personal injuries, the plaintiff's replication to defendant's plea of a general release from the plaintiff for the grievances complained of, set forth that the release was obtained from the plaintiff while she was suffering from the injuries for which the suit was brought, and while she was under the influence of opiates, and not in the possession of her full mental powers. Held, that the replication should have averred either that plaintiff's lack of mental capacity at the time of making the release was so great as to render her incapable of understanding the effect of the instrument, or that defendant had notice of her mental condition when he procured the release.

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## CRIMINAL LAW.

Section 2194 of Burns' Rev. Statutes of 1894 (Indiana) provides that whoever shall "sell, barter, or give away" any liquor on certain days shall be subject to a penalty.

**Sale or Gift of Liquor** The Appellate Court of Indiana occupies nine columns of the *Northeastern Reporter* in proving that this statute does not render criminal a gentleman who invites some friends to his rooms and opens a bottle of champagne for them as an act of hospitality: *Austin v. State*, 53 N. E. 481.

The subject of gifts and sales of intoxicating liquors is exhaustively treated by Luther E. Hewitt, Esq., in 38 AMERICAN LAW REGISTER, 17.

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## DECEDENTS' ESTATES.

The Court of Chancery of New Jersey has recently construed the New Jersey Statute (P. L. 1887; 3 Gen. St. p. 3763, § 34), which prevents the lapsing of legacies in certain cases. The statute provides, *inter alia*, that when an estate is devised or bequeathed to any child of the testator, and that child shall die within the lifetime of the testator, leaving any child who shall survive the testator, the estate shall not lapse, but "shall vest in such child . . . in the same manner as if such legatee or devisee had survived the testator or testatrix and had died intestate."

In *Suydam v. Voorhees*, 43 Atl. 4, a legacy to a deceased child was claimed by his child, and the question was whether or not the legacy was subject to a debt of the claimant's father. Relying on the words, "*shall vest*," in the statute the court

## DECEDENTS' ESTATES (Continued).

held that the legacy was not so liable, but noted the fact that the contrary result has been reached in the interpretation of the corresponding English statute. See *Eager v. Furnivall*, 17 Ch. D. 115.

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## EVIDENCE.

In an action against a natural gas company for an over-supply of gas, whereby a gas stove was overheated and the house burned down, it appeared that the supply of gas was uniform to all houses throughout the city, but that the supply to each house was regulated by an appliance called a "mixer," of which the consumer possessed the key, and that it was in his power to shut off or regulate the supply.

The trial court admitted evidence to the effect that on the night of the fire stoves of other residents in the city were overheated. This was held to be error by the Appellate Court of Indiana, in that there was no proof that the witnesses' "mixers" were admitting the same amount of gas as that of the owner of the house which had been burned: *I. N. & I. Gas Co. v. N. H. Ins. Co.*, 53 N. E. 485.

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## HUSBAND AND WIFE.

*Johnson v. Johnson*, 49 S. W. (Tenn.) 305, decided that a petition by a husband to be credited for excessive income paid to his wife under an order of alimony is not demurrable, on the ground that it is a suit by husband against a wife.

Some of the Western states allow a deserted wife, instead of suing for a divorce, if she prefers, to bring an action for maintenance to compel her husband to contribute permanently to her support. In *McMullin v. McMullin*, 56 Pac. (Cal.) 554, after such suit brought, the husband, in good faith, offered to return and furnish his wife with a home. It was held that this furnished a defence to the suit, not because of any tenderness for delinquent husbands, but because of the law's aversion to the separation of spouses.

*In re Neff*, 56 Pac. (Wash.) 383, decides that the decree of a divorce court, awarding the custody of the children to the

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LAW REGISTER, 17.

# DECEDENTS' ESTATES

The Court of Chancery of the State of New Jersey

1. **Language**  
 2. **Agency**  
 3. **Cost**  
 4. **Insurance**

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## MORTGAGES.

*Clifford v. Minor*, 78 N. W. (Minn.) 861, follows the familiar rule that the purchase of premises, subject to mortgage, **Assumption** is not liable personally for the mortgage debt except upon proof of his promise to pay it.

*Weadock v. Noeker*, 78 N. W. (Mich.) 669, holds that a **Payment of Taxes** junior mortgagee, who pays taxes to protect his mortgage, has a lien for the amount of the taxes superior to that of the senior mortgagee.

In Michigan unrecorded mortgages, whether of real or personal property, are void as against creditors. In *Baker v. Parkhurst*, 78 N. W. (Mich.) 643, this principle **Failure to Record** was applied. It appeared that the mortgaged property had been sold by the mortgagor to a third party with the consent of all parties in interest, and the proceeds paid to the mortgagee on account of the mortgage. It was held that, in legal effect, this was the same as if the property had been sold under the unrecorded mortgage, and the proceeds were, therefore, attachable by the creditors, who had given credit while the mortgage was kept off the record.

Even in these days railway mortgages do not always and of necessity cover after-acquired property, as is proved by the **After-Acquired Property** case of *Louisville Trust Co. v. Cincinnati Inclined Plane Rwy. Co.*, 91 Fed. 699. The mortgage, executed in 1879, covered "the railways, rails, bridges and real estate," "all and singular the cars and rolling stock," the franchises and property of the company, etc. It was held that these words, not referring to after-acquired property, included simply the railways, cars and property of the company then in existence. The additional words, "tolls, incomes, issues and profits," were held, however, to cover such additional new rolling stock as was necessary for the acquiring of income.

## NEGLIGENCE.

In an action against a railroad for insanity, resulting from a nervous shock received in a collision, it appeared that in two **Proximate Cause, Insanity from Sight of Accidents** instances after the collision plaintiff had been a witness of other accidents on the same road, and it was questionable whether her insanity had not been induced from the horrible sights seen in the latter cases. The trial judge charged the jury that if plain-

## NEGLIGENCE (Continued).

tiff's insanity was caused by either of the two latter accidents, or even by them in conjunction with the accident in which plaintiff was injured, then their verdict must be for the defendant. Counsel for the defendant excepted to this charge—for what reason it is rather hard to see. The Supreme Court of Massachusetts overruled the exceptions without comment: *Rooney v. N. Y., N. H. & H. R. Co.*, 53 N. E. 435.

The sensible rule of applying the doctrine of *res ipsa loquitur* to the cases of broken electric wires, is now becoming general. Thus the Court of Appeals of New Jersey has properly held that where a broken telephone wire had fallen across an unguarded trolley wire and hung down into the street, so that plaintiff, who picked up the end to remove it from the path of his horse, was injured, the questions of the negligence of the telephone company and the trolley company, as well as that of plaintiff's contributory negligence, were for the jury: *N. Y. & N. J. Tel. Co. et al. v. Bennett*, 42 Atl. 750.

## PARTNERSHIP.

There is no principle of law better settled than that when a partner sells or mortgages firm property; he conveys only his interest in the firm after the debts are paid, and the grantee gains no title to any specific chattels. In reaching this result, however, the Supreme Court of Indiana uses language, which intimates that this court has joined the rapidly-growing number of those who recognize the entity of a partnership apart from the partners, just as the entity of a corporation apart from the stockholders.

"While, in fact, a partnership is composed of individual members, still a firm so constituted is recognized as a distinct legal entity different and distinct from the persons who compose it. Therefore the principle is universally recognized that a partner's interest in or title to the firm property is not an interest in or title to any specific property. The effects or property of the partnership belong to the firm so long as it exists, and not to the members who compose it:" *Johnson v. Shirley*, 53 N. E. 459.

**REAL PROPERTY.**

In *Murray v. Crozer*, 53 N. E. 477, A leased land with a provision in the lease that after A's death the rent should be paid to his wife for life. The Appellate Court of Indiana held the provision void for two reasons: (1) Since rents, being in the nature of chattels real and annexed to the realty, are incidents of the reversion and pass to the heir, the owner of the land cannot alien that portion of them which become due after his death, and (2) since this was in effect a testamentary disposition of property and lacked the formalities required by the statute of wills.

**Lease, Provision for Disposal of Rent after Death of Lessor**

In *Sampson v. Grogan*, 42 Atl. 713, the Supreme Court of Rhode Island gives a learned opinion on the subject of waste by tenants for life. The defendant in the case was the executor of a life tenant, who held the property under a will which provided that she (the life tenant) was to occupy the house for life, "she to keep the same in repair." The house was accidentally burned during her tenancy, and this action was brought after her death against her executor by the remainderman.

**Tenant for Life, Waste, Accidental Burning of House**

The court, after examining all the authorities, English and American, since the statutes of Marlbridge and Gloucester, comes to the conclusions (1) that under Gen. Laws, R. I., c. 268, providing that a life tenant who shall commit or suffer waste shall forfeit the place wasted and double the amount of the waste, the life tenant in this case was not responsible, and (2) that the implied promise of the tenant to keep the house in repair was not broad enough to render her liable for an accidental fire, although the court admits that it would have been otherwise had she been in possession under a lease.

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**SALES.**

The Supreme Court of Vermont adheres to the strict rule of *caveat emptor* in *Warren v. Buck*, 42 Atl. 979, and holds that a farmer selling hogs to a butcher, knowing that the latter intends to convert them into pork for resale to his customers, does not impliedly warrant them to be fit for use as food.

**Implied Warranty**

**SURETYSHIP.**

It hardly required the authority of a decided case to show that the mere acceptance of the resignation of a defaulting official does not release his surety from liability: *Stemmerman v. Lilienthal*, 32 S. E. (S. C.) 535.

**TRADE-NAME.**

Two firms in the same business, the Tygerts and the Allens, formed a corporation under the name of the Tygert-Allen Company, and agreed to allow it to use their trade-names as far as they should apply or become necessary in the business. The Tygert-Allen Company continued in business for some time, during which it did not use the name "Tygert" on its goods, but advertised them as "Allen's Phosphates," etc. Subsequently a new corporation, called the Tygert Company, was formed by some of the members of the Tygert-Allen Company, and used the name "Tygert" for their trade-name.

In a bill in equity for an injunction to prevent the Tygert Company from using this trade-name, the Supreme Court of Pennsylvania decided that the fact that complainant had been content to see the defendant use the name "Tygert" for three years without any objection and without any attempt by complainant to use it, was sufficient to bar complainant from equitable relief: *Tygert-Allen Co. v. Tygert Co.*, 43 Atl. 224.

**TRIAL.**

Scarcely a month passes in which an attorney does not demand a postponement of a case or a new trial, etc., on account of what appears in the newspapers. In *Ill. Cent. Rwy. Co. v. Souders*, 53 N. E. 408, which was an action against a railroad for personal injuries, the defendant, on a motion for a new trial, offered an affidavit that there had appeared in the newspapers of Chicago during the trial notices of the suit, and statements that on a former trial plaintiff had been awarded a verdict of \$15,000, which affiant believed had found their way to the jury room. But since no opinion on the merits of the case had been stated in the newspapers, the trial court very properly refused to grant a new trial on that ground, and its decision was sustained by the Supreme Court of Illinois.

## TRUSTS.

The vexed question as to whether a declaration of trust made by a person placing money in a bank creates a valid trust, if it does not come to the knowledge of the *cestui que trust*, has come before the Court of Appeals of Maryland. Money was deposited by A in a savings bank and the following memorandum was made on the pass book: "Metropolitan Savings Bank, in account with A. In trust for herself and B, joint owners, subject to the order of either; the balance at the death of either to belong to the survivor."

The court held this to be a valid declaration of trust, and B was entitled to claim the whole fund on A's death, notwithstanding the fact that she was unaware of the creation of the trust and that A had retained the book during her life: *Mil-holland v. Whalen*, 43 Atl. 43.

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UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

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EVIDENCE ; LETTERS ; ANSWERS ADMITTED WITHOUT PREVIOUS LETTERS. In *New Hampshire Trust Co. v. Korsemeier Plumbing and Heating Co.*, 78 N. W. 303 (Nebraska, February 9, 1899), it was decided that a letter written in answer to another is admissible as evidence if fairly self-explanatory, although the letter which it answers is not offered along with it. The failure to produce the prior letter, it is said, may affect the weight of the letter but not its admissibility. In the opinion, Irvine, C. J., cites in approval the cases of *Barrymore v. Taylor*, 1 Esp. 326 (1795), and *De-Medina v. Owen*, 3 Car. & K. 72 (1850), and states that Greenleaf on Evidence and Underhill on Evidence both give the rule otherwise, relying on *Phillips Walson v. Moore*, 1 Car. & K. 626 (1845).

Upon first consideration this question would necessarily seem to be of almost daily occurrence, yet the text books are nearly bare of

citations. The case of *Walson v. Moore*, above mentioned, or *Watson v. Moore*, as it appears in the English Common Law Reports, is of no great value. Plaintiffs counsel was stopped by Baron Pollock in the reading of a letter written by the defendant, the opening words having indicated that it was an answer to a letter of the plaintiff, and directed the other letter to be offered first, which was done. This case is given in Greenleaf in a note under section 201. The rule there laid down on its authority is followed by *Lester v. Sutton*, 7 Mich. 329 (1859), but so far as can be ascertained by no other cases.

In the first case cited by the court, *Lord Barrymore v. Taylor*, 1 Esp. 326 (1795), objection was made to the reading of certain letters unless the letters to which they were the answers were first produced, but Lord Kenyon said that there was no rule of law that required such evidence, that if opposing counsel thought them necessary to explain the transaction, he might produce them as they were in his client's possession. *DeMedina v. Owen*, 3 Car. & K. 72, decided by Baron Parke some fifty years after, was also to the same effect. In *Brayley v. Jones*, 33 Iowa, 508 (1841), in answer to such an objection, the court said: "This may be the rule if the first letter is necessary to the understanding of the one offered, and will aid in the better understanding of it; or where it appears that the answer may be misunderstood without the letter to which it is a reply being read. But if the letter offered in evidence contains distinct and independent propositions or statements of facts which cannot be misunderstood if read alone, and are in no way dependent on the first letter, we are of opinion that it is admissible without the conditions suggested by counsel."

But is it not sufficient that it be intelligible when taken with the rest of the testimony? In *Beech v. The Railroad*, 37 N. Y. 457 (1868) it was held, with much reason, that the meaning of a letter might be ascertained from other evidence in the case, and the other authorities on the admissibility of letters do not make such a qualification.

*Stone v. Sanborn*, 104 Mass. 319 (1870), was an action for breach of promise of marriage. The plaintiff's counsel offered some of defendant's letters and some of plaintiff's, making selections of such as he desired to put in. The defendant objected, but the trial judge permitted them to be read. One of these letters appeared to be in reply and in reference to the contents of a letter of the plaintiff's, which was not put in. On appeal this ruling was affirmed, Gray, J., saying: "If the letters which she introduced showed that they were written in reply to other letters, she might doubtless give in evidence those letters, too, as tending to explain the replies. She was not, however, bound to do so, but might leave it to defendant, upon cross-examination or otherwise, to offer any competent evidence of them or their contents if he wished. If the ruling of Chief Baron Pollock in *Watson v. Moore*, 1 C. & K. 625, cited for the defendant, that the party offering the



reply in evidence should put in both the letters or neither, was anything more than an exercise of discretion, as to the order of proof it is more than counter balanced by the opinion of Lord Kenyon in the earlier case of *Barrymore v. Taylor*, 1 Esp. 326, and of Baron Parke in the later one of *DeMedina v. Owen*, 3 C. & K. 72. In *Crary v. Pollard*, 14 Allen, 284 (1867), the reply was held admissible as evidence of notice to the party to whom it was addressed, without producing the letter to which it referred; and the question whether it was admissible for any other purpose was not considered. When a particular communication which refers to a previous one is not introduced as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may introduce the first also, and if he does not the other party may. The actual custody of the paper does not affect the question which party shall introduce them but only the steps to compel their production."

Again, in *North Berwick Co. v. Ins. Co.*, 52 Me. 336 (1863), it was said that the plaintiffs were under no obligations to offer more of the letters of defendants' agent than they should deem conducive to their interest. See, also, *Newton v. Price*, 41 Ga. 186 (1870); Taylor on Evidence, Sec. 734; Wharton on Evidence, Sec. 1103.

Where such a letter contains an admission, it must be clear that it should be accepted irrespective of the fact that it is in answer to another. Thus, in *Woggin v. Railroad Co.*, 120 Mass. 201 (1876), plaintiffs declared in tort for the conversion of one hundred and fourteen bushels of oats taken by defendant's agent from a freight car to reduce the shipment to the amount at which the car had been billed. Plaintiffs offered in evidence a letter of the agent in reply of one of theirs admitting the removal of the oats, not giving quantity. The Supreme Court held that, as it contained a declaration of an agent within the scope of his authority, it was competent as offered.

In an action of trespass for some cases of rubber shoes, which plaintiff claimed had been consigned on commission, against a constable who had taken possession of them under an attachment against the consignees, certain letters of theirs admitting this fact were offered in evidence. They appeared to be in reply to others written by the plaintiff. Defendants objected to their admission, but the Supreme Court of Vermont held that they were properly received: *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29 (1858).

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CRIMINAL LAW; FORMER TRIAL; CHANGE IN FORM OF INDICTMENT. *State v. Adams*, 78 N. W. 353 (South Dakota). Adams was indicted for rape and convicted. Upon appeal, the Supreme Court first denied him a new trial, but later, since the prosecuting

witness was proved to have been more than sixteen at the time laid in the information, the court arrested the judgment upon its own motion and ordered the defendant to be held in custody ten days for the purpose of such further criminal proceedings as might be instituted against him. The state then brought a new information against Adams for the same offence, charged in identical language, except for the fact that the date of the offence was changed from August 30, 1896, to December 20, 1895. The prisoner was convicted after having entered a plea of former jeopardy; and the Supreme Court, upon appeal, held that the defendant had been tried for the same offence and that his plea should have been sustained.

The court's decision in the present case is open to serious objection. The constitutional provision, according to the authorities, does not mean that a man may not be tried twice for rape, arson or any other offence at law; but, to use the words of Judge Cooley, "by the same offence is not signified the same *eo nomine*, but the same criminal act or omission:" Cooley's Constitutional Limitations, 326 (note). See, also, IV Blackstone, 336. In the present case there were clearly two separate criminal acts, for the defendant was convicted, before a jury, of committing the offence upon August 30, 1896, and was found guilty of a similar offence upon December 20, 1895. The jury's verdict, upon each trial, was final so far as the fact was concerned.

The reasoning of the Michigan Court in the case of *People v. Gault*, 104 Mich. 575 (1890), can well be applied to the present case. There a man had been indicted for illegally selling liquor upon May 1st, and set up as a defence the fact that he had been convicted of the same offence committed upon June 30th. The court said: "the offence with which the defendant is charged was complete on May 1st. Had a prosecution then been instituted for this offence and the respondent thereafter arrested for a like offence committed upon June 30th, it is conceded that the prosecution for the prior offence would not constitute a bar, and we are unable to see why, in reversing the facts, the same rule does not obtain." For the same doctrine, see *U. S. v. Snow*, 9 Pac. (Utah) 686; *Com. v. Walker*, 3 Dist. Ct. Rep. (Pa.) 348 (1894); *Fleming v. State* (Tex.), 12 S. W. 605; *Reed v. State* (Tex.), 29 S. W. 1085; *Peo. v. Sinnell* (N. Y.), 30 N. E. 47; *Evans v. State* (Ark.), 15 S. W. 360; *Vowells v. Com.*, 83 Ky. 193.

The case that comes most nearly to sustaining the decision in question is that of *Com. v. Goff*, 66 Mo. App. 49, (1896). There, to an indictment for illegal liquor selling in September, the defendant pleaded an acquittal of the same offence alleged to have been committed upon November 17, 1893. The plea was sustained, but the court expressly said that there was evidence "tending to show that the prosecuting witness' testimony before the justice and upon this proceeding referred to *the same transaction*." In the present case, the jury's verdict showed that the same transaction was not in question.

There is another class of cases, illustrated by *Com. v. Goulet*, 160 Mass. 276 (1894), where former jeopardy is held to be a good plea. For instance, where a man is indicted for an offence committed upon November 20th and pleads a former acquittal upon an indictment, charging him with the same crime upon July 1st and divers days between that day and November 21st. This case is clearly not analogous to the present. It comes under the rule that a man cannot be tried under a second indictment, where the facts alleged in the second indictment, if proved, would have convicted under the first. How does this rule apply to the present case? Evidence showing an offence committed upon December 20, 1895, could not convict the defendant of a crime alleged to have occurred upon August 30, 1896.

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ASSAULT WITH INTENT TO MURDER; EVIDENCE AS TO PREVIOUS DIFFICULTY; SELF-DEFENCE. In *Ellis v. The State* (Ala.), 25 So. 1 (1899), appellant was convicted in the court below on an indictment charging assault with intent to murder. It appeared that the prosecutor was going along the highway when the defendant came up and stabbed him with a knife, saying "You told Mr. Chestnut." On a previous night the prosecutor had been put to watch certain property belonging to Mr. Chestnut where thefts had recently occurred. While on guard there he detected defendant and another man approaching, shot at them, but without effect, and reported the matter to his master. This evidence of a previous difficulty was introduced to show motive on the part of the accused. For the defendant the plea of self-defence was made. The verdict in the lower court was for the state. On appeal to the State Supreme Court, Dowdell, J., held, that the use of the word "entirely" by the trial judge in explaining the meaning of self-defence in these terms "that in order to be acquitted on that ground, defendant must be entirely free from fault in bringing on the difficulty" was correct.

The appellate judge's ruling that the defendant must have been *entirely* free from fault if he wishes to set up the claim of self-defence seems at first rather harsh. To say that there is a difference between "entirely free" and simply "free" from fault is not hypocritical (as the judge here insists), but when the personal equation of the average jurymen is considered, an important distinction. The following example will illustrate briefly the difference between these two phrases and the force they would have on one not acquainted with legal terms. A man wishing and intending to create a combat with another, meets him on the road and makes insulting and derisive remarks to him on the spot, and the second comer, possibly in the first heat of passion, attacks the first man. In such a case the first man could hardly be said to be *entirely* free from fault, but, nevertheless, his conduct is from a legal point of view faultless, for mere remarks are no justification for an assault.

In other jurisdictions there seems to be a more liberal interpre-

tation of this rule than is shown in the principal case. This is shown in the case of *The State v. Maguire*, 69 Mo. 197, where a much more lenient wording of the same rule was accepted. There it was said "a person who brings on a difficulty cannot avail himself of the right of self-defence." And in an Illinois case, *Hulse v. Tolman*, 49 Ill. App. 490, on the same point the Appellate Court held, "The law will not permit him (the defendant) to provoke or bring on a difficulty with the plaintiff, and then avail himself of the plea of self-defence." In a previous case in the same state, *Adams v. The People*, 47 Ill. 376, the court held that while a man threatened with danger will not be held liable criminally for an honest mistake as to its imminence, yet "at the same time, he has not the right to provoke the quarrel and take advantage of it, and then justify the homicide."

However, it is true that the charge that the defendant must have been "entirely free" from fault, though more strict than the rule in other states, still represents the Alabama doctrine. For example, in another case in that state, *Howard v. The State*, 20 So. 365, Haralson, J., held that, "in order to invoke the doctrine of self-defence, the law requires that the defendant should have been free from all fault or wrong doing, which had the effect to provoke or bring on the difficulty." Two other Alabama cases illustrate the same rule—*Bell v. State*, 22 So. 526, and *Crawford v. State*, 21 So. 214—where (p. 223) "reasonably free" from fault is distinctly said to be erroneous, and that free from all fault or wrong doing is correct.

The question as to whether the defendant must have been absolutely free from fault before he can set up the plea of self-defence, seems to have been little noticed in the text books. In Clark's Criminal Law, p. 156, it is said, under the title of Homicide, "A man will not be deemed the aggressor within this rule merely because his acts provoked the difficulty, unless they were calculated or intended to have that effect."

What has here been called the Alabama Rule is probable, both legally and morally, the more just. No loophole of escape by the plea of self-defence should be permitted a wrongdoer, who had the full intention of quarreling with and injuring another, but who happens to be shrewd enough to adopt the idea of protecting himself by inciting, by insulting verbal expressions, his opponent to strike the first blow. The Alabama courts, in ruling that a defendant who wishes to plead self-defence must be free from fault in provoking the encounter, not only legally in the technical sense, but *entirely* free, have taken a step in the right direction. It may even be that this interpretation of the law has grown up so gradually that the difference between the phrases "free" and "entirely free" is not fully appreciated by the judges. But, be that as it may, this stricter rule must certainly have a beneficial influence, in that it tends to suppress a certain class of criminals ever on the alert to stir up a stabbing affray, as in the principal case, on the slightest provocation.

**DIVORCE ; EXTRATERRITORIAL EFFECT OF A DECREE OF DIVORCE.** In a recent case, *Streetwolf v. Streetwolf*, 41 Atl. 876 (1898), the Court of Chancery of the State of New Jersey refused to recognize the extraterritorial validity of a decree of divorce granted by another state under the following circumstances: A husband who had resided many years in New Jersey, on being sued by his wife for a divorce *a mensa et thoro* and alimony, unknown to anyone secretly betook himself to a town in North Dakota, where, ninety days after his arrival, he instituted divorce proceedings against his wife and obtained a decree for an absolute divorce. It was apparent that his sole purpose in going to North Dakota was to secure the decree of divorce, and without any intention of acquiring a permanent domicile there. It appeared also that he engaged in no business in that state, and was, in fact, there only a small portion of the period between his arrival and the institution of the suit. The Court of Chancery set aside the decree upon the grounds that the husband had not acquired a *bona fide*, actual domicile in North Dakota, thereby committing a fraud upon the courts of that state.

A decree of divorce is recognized everywhere when the state has jurisdiction of the parties and determines the status and rights of both parties, and generally when only one of the parties is within the jurisdiction of the state, and the defendant has been summoned or has voluntarily appeared: *Doughty v. Doughty*, 28 N. J. Eq. 586 (1876); *Van Fossen v. State*, 37 Ohio, 317 (1881). But this is due to the comity between the states, and does not result from the constitutional provision which declares that full faith and credit shall be given in one state to the judicial proceedings in every other; for that provision applies only to divorces granted by a court which has jurisdiction of the parties and subject matter: *Pennoyer v. Neff*, 95 U. S. 714 (1877); *People v. Baker*, 76 N. Y. 75 (1879). But if the state has jurisdiction of neither of the parties by reason of their being non-resident, the decree can have no effect on their status without the state: *People v. Dowell*, 25 Mich. 247 (1872).

What, then, is the test of jurisdiction? It is the domicile of the parties. The domicile must be actual and *bona fide*, and complainant must remain for statutory period: *Hood v. State*, 56 Ind. 263 (1880); *Gregory v. Gregory*, 76 Me. 535 (1884); *Van Fossen v. Van Fossen*, 37 Ohio, 317 (1881). Some states hold that, if the complainant *bona fide* takes up his domicile in another state and has jurisdiction over the parties and subject matter, the divorce is valid everywhere: *Pennoyer v. Neff*, 95 U. S. 714 (1877). It results from the comity existing among the states, for no state has the right to dissolve or change the domestic status of persons belonging to other states: *People v. Baker*, 76 N. Y. (1879). In New Jersey a decree granted in another state, where the defendant has been summoned and had actual notice, is recognized—*Doughty v. Doughty*, 28 N. J. Eq. 581 (1876)—but not on notice by publication: *Flower v. Flower*, 42 N. J. Eq. 152.

(1886). In New York actual notice, much more notice by publication is not sufficient: *O'Dea v. O'Dea*, 101 N. Y. 23 (1886); *People v. Baker*, 76 N. Y. 78 (1879). The courts of Iowa recognize the validity of a divorce as to both parties obtained on the domicile of one, with notice of publication to the other: *Van Arsdal v. Van Arsdal*, 67 Iowa, 35 (1885); and the same is true in Indiana: *Hood v. State*, 56 Ind. 263 (1877). In *Turner v. Turner*, 44 Ala. 437 (1876), the court went so far as to recognize a divorce granted on behalf of the husband in Indiana, the wife not having been summoned or having appeared—as to the husband but not as to the wife—and so granted her a divorce. Other states also recognize the validity of a divorce granted one of the parties in another state, while not regarding it as conclusive upon the status or rights of the party within its own jurisdiction: *Cook v. Cook*, 56 Wis. 195 (1882); *Wright v. Wright*, 24 Mich. 181 (1872); *Stetphen v. Stetphen*, 58 Me. 508 (1870); *Barrett v. Furling*, 111 U. S. 523 (1883).

The invalidity of a divorce, due to want of jurisdiction, can be shown in any proceeding in any court: *Litowich v. Litowich*, 19 Kans. 451 (1878); *Sewall v. Sewall*, 122 Mass. 156 (1877); *People v. Dowell*, 25 Mich. 247 (1883). In *Reed v. Reed*, 52 Mich. 117 (1883), the husband had moved into Indiana and taken up a false domicile and secured a divorce. The Michigan court went behind the record and declared the divorce void. The same was held in *Gregory v. Gregory*, 76 Me. 535 (1874).

There is a question whether a decree of divorce obtained by publication may, as other decrees in equity, be subsequently opened by the defendant, who had no actual notice. The following courts hold that it may be: *Lawrence v. Lawrence*, 73 Ill. 577 (1874); *Smith v. Smith*, 20 Mo. 166 (1854). The following hold the contrary: *McJunkins v. McJunkins*, 3 Ind. 31 (1851); *Gilruth v. Gilruth*, 20 Iowa, 225 (1866); *O'Connell v. O'Connell*, 10 Neb. 390 (1880); *Lewis v. Lewis*, 15 Kans. 181 (1875).



## BOOK REVIEWS.

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THE LAW OF TRADE AND LABOR COMBINATIONS, AS APPLICABLE TO BOYCOTTS, STRIKES, TRADE CONSPIRACIES, MONOPOLIES, POOLS, TRUSTS AND KINDRED TOPICS. By FREDERICK H. COOKE, of the New York Bar. Chicago: Callaghan & Co. 1898.

The author, in treating of the different phases of trade and labor combinations, has divided his book into two parts, for the purpose of grouping combinations in fundamental classifications—Part I, Combinations Producing Private Injury, and Part II, Combinations Producing Public Injury. In treating of combinations under Part I, he rejects the doctrine of *intent* and *combination* as the test of illegality, and announces as the true test of civil liability for an act of trade or labor combination, *whether it is the natural incident or outgrowth of some existing lawful relation*. The author applies this test to each form of trade or labor combination in a very interesting manner, and points out the remedies, if any exist.

In Part II, after discussing the confusion in the decisions as to the basis of illegality in trusts and monopolies, he points out, as the test of liability, test of extent and the test of reasonableness. There is an Appendix, containing the constitutional and statutory provisions relating to topics discussed in the different states and in the United States. The book is an intelligent discussion of a subject of great and growing importance.

H. W. M.

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ARCHBOLD'S QUARTER SESSIONS (FIFTH EDITION). By G. SHERSTON BAKER. London: Shaw & Sons.

While it is not our custom to give books of this type much space, we feel it our duty to note the thorough, careful way in which Mr. Baker has produced this fifth edition. He calls our attention, in his short, direct preface, that he has endeavored to provide the practitioner, who attends Courts of Quarter Sessions, with a little *vade mecum*. . . . A book treating sufficiently of the practice of those courts, but at the same time not too bulky in size.

Thus, as we are led by the preface to expect, the chief value of the book lies in the time saved for the busy English practitioner. Much of the matter is condensed into tables, as of allowance to witnesses, costs of appeal, procedure on appeal, any point or stage in which may be noted at a glance by means of this tabulated form and admirable arrangement.

The book is not, nor was it intended to be, of interest to other than the English lawyer; but it may be cited to our American writers, as showing a successful method of condensing a large mass of matter in a comparatively small volume.

T. C.



**THE LAW OF AGRICULTURAL HOLDINGS.** BY SYLVAIN MAYER, B.A. Ph.D. London: Waterlow & Sons. 1898.

Statutes peculiarly local in their nature and affecting but a particular class of industry are not apt to be widely studied in communities without the pale of their jurisdiction. To those, however, who are interested in noting the strides which recent legislation has taken towards releasing tenants from the bonds within which the common law rules encompassed their meagre rights, this volume, though purely of English applicability, ought to be of considerable interest.

The work is intended as a commentary on the Law of Agricultural Holdings in force in England at the present day, and presents a careful analysis of the various acts governing the subject, as well as separate chapters upon the forms and procedure thereunder.

*O. S.*

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**THE BANKRUPTCY LAW OF THE UNITED STATES.** By THEODOR AUB. Brooklyn, New York: Eagle Book Printing Department. 1899.

The already numerous collection of works on the National Bankruptcy Law of 1898 has been enriched by the recent volume of Theodor Aub, referee in bankruptcy in New York. Besides the complete context of the Bankruptcy Law, divided into seven chapters, each of which is subdivided into sections with appropriate captions, the book contains a tabulated index of the law alphabetically arranged as to sections, rules and forms. A time table of the Act in the order of the sections, and according to their numerical position is appended. It is supplemented by a complete set of the rules relative to bankruptcy proceedings, as adopted by the Supreme Court of the United States on November 28, 1898, and a list of approved forms. A schedule of the expenses incurred in obtaining a certificate of bankruptcy is also given. The work is a concise but complete treatise on the subject of bankruptcy and will prove of great assistance to those practicing in the Federal courts.

*P. V. C.*

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**SPECIFIC PERFORMANCE OF CONTRACTS.** By WILLIAM DONALDSON RAWLINS, M. A., Q. C. Pp. 200. London and Edinburgh: Sweet & Co. 1899.

This neat and attractive volume is, the author states, an expansion of an article by him published in "The Encyclopædia of the Laws of England;" and he modestly explains in his preface that the book "does not seek to enter the lists as a competitor for the favor of the profession with the standard treatise on Specific Performance," but that it is merely "a concise text-book, which aims at discharging the modest function of a finger-post." This function it discharges very successfully, its chief merits being conciseness, and very carefully and judiciously selected authorities, compara-

tively few in number, but covering the whole field of the broad subject which the author has undertaken to discuss.

After pointing out that "specific performance appears to be a plant of distinctively English growth, and to flourish only where there is a juridical system in which the characteristic ideas and principles of English Courts of Equity have taken root," the author describes the origin and development of this branch of the jurisdiction of those courts, its extent, and the manner in which it is exercised. The book will be more useful to the student of law and to the English barrister than to the practicing attorney in the United States; although the latter, also, will find the work valuable for its citation of numerous recent leading cases decided in the courts of Great Britain and for its clear, logical and comprehensive statement of fundamental principles of equity. The chapters on "The Statute of Frauds" and on "Injunction" will prove particularly valuable to the American lawyer.

But one criticism occurs to the reviewer, namely, that in the enumeration and description of the classes of contracts, specific performance of which may be compelled, the author omits the important class of cases involving the use and enjoyment of real estate, which are discussed in Story's Equity Jurisprudence, Vol. I (Redfield's Ed.), §§ 720 to 721a, inclusive; and concerning which Story states this rule: "That it is competent for the court to interfere to enforce the specific performance of a contract by the defendant to do definite work upon his property, in the performance of which the plaintiff has a material interest, and one which is not capable of an adequate compensation in damages." This class of contracts does not seem to be included in any of those classes enumerated by the author, although it should manifestly be included in the list.

*M. H.*

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## SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

### INTRODUCTORY.

At the very beginning of his study of the law, the attention of the writer was attracted to the famous case of *Gelpcke v. Dubuque*,<sup>1</sup> through the medium of a club argument.

He noticed that writs of error to state courts had, in similar cases, never been permitted by the Supreme Court of the United States, and felt that something was wrong, which permitted so inconsistent a result to be reached, *i. e.*, that federal courts would reverse or disregard state decisions, where diverse citizenship gave jurisdiction, and refuse to assume jurisdiction, when such cases applied for admission from the highest court of a state.

As a result of these thoughts, the writer carried in his mind a half-formed purpose to go deeper into the subject, should opportunity offer: a purpose which might never have been realized had it not been for some very recent decisions of the Supreme Court of the United States, which seem to

<sup>1</sup> Wall, 175.

recognize the inconsistency of the two positions assumed by that court, and give him courage to reopen a much-vexed question, knowing that however poorly his efforts may be rewarded, he can scarcely leave the controversy in a worse condition than it now is. The case of *McCullough v. The Commonwealth of Virginia*,<sup>1</sup> must serve as an apology for adding another paper to the long list of articles, which have treated of the question involved in *Gelpcke v. Dubuque*.

#### SECTION I.—STATEMENT OF THE CASE.

The case of *Gelpcke v. Dubuque*<sup>2</sup> was brought into the Supreme Court of the United States by writ of error to the Circuit Court for the District of Iowa.

By acts passed in 1847, 1851 and 1857, the legislature had authorized the City of Dubuque to issue certain bonds for the purpose of raising money to assist in the construction of a railroad. These bonds, the acts declared, were legal and valid and "neither the City of Dubuque, nor any of the citizens, shall ever be allowed to plead that the said bonds are invalid." These acts were duly passed upon by the Supreme Court of Iowa, which, during a period of six years and by seven different decisions, declared the said acts to be legal and binding.

Thereafter certain of these bonds came for a valuable consideration into the hands of the plaintiff.

After this transaction the Supreme Court of Iowa declared the acts giving authority for the issuance of the bonds to be unconstitutional.<sup>3</sup> This decision, obviously, overruled the seven previous decisions.

The City of Dubuque having failed to pay the coupons, when presented, the plaintiff brought suit in the Circuit Court of the United States, by virtue of the diverse citizenship of the parties. The city pleaded, *inter alia*, that the acts author-

<sup>1</sup> 172 U. S. 102 (Dec., 1898).

<sup>2</sup> 1 Wall, 175.

<sup>3</sup> *State of Iowa ex relatione v. The County of Wapello*, 13 Iowa, 388.

izing the issue of the bonds in question were unconstitutional and void, relying on the case of *Iowa v. County of Wapello*.<sup>1</sup>

It is not proposed at this point to go into the principles of the decision, nor into the correctness of the views advanced. Suffice it for the present, to say that the Circuit Court having adjudged for the defendant, feeling itself bound by the decision of the state court, the United States Supreme Court reversed the decision and sent the case back for further proceedings.

While commentators and judges differ as to the reasons which were in the mind of the court, this much, at least, is certain : The Supreme Court disregarded the decision of the State Court of Iowa, which declared the bonds void, and held them to be valid.

In addition, it may be mentioned that the State Constitution had been unchanged from the time of the passage of the acts authorizing the issuance of the bonds. Also that it was assumed that the compliance with the terms of the acts was perfectly regular.

Mr. Justice Swayne delivered the judgment of the court in a short opinion, which has given rise to much criticism on account of some rather unfortunate expressions which that learned justice permitted to escape him. Mr. Justice Miller dissented with no uncertain voice in an opinion which has become famous as the foundation of the arguments of the opponents of *Gelpcke v. Dubuque*.

## SECTION II.—THE PRINCIPLE UPON WHICH THE CASE WAS DECIDED.

The only undisputed point decided in *Gelpcke v. Dubuque* was that the bonds held by the plaintiff were valid, in the face of a state decision adjudging them void.

Many different reasons have been assigned as being the basis of the court's decision. These reasons have, in most instances, been advanced by the writers who intended later to

<sup>1</sup> *Supra*, p. 474.

demolish them, consequently they have not been uniformly accepted as laying down sound rules of law.

The question is, why did the Supreme Court, since they professed to be administering the law of the state, feel at liberty to disregard a state decision, adjudging these bonds void? It is the purpose of this section to answer that question. Before doing so, we wish to lay the ground by proving that

*A. The federal courts are bound absolutely to accept the state courts' construction of state statutes.*

The rule of law as above laid down is one very familiar to every student of constitutional law. We believe the truth of the principle has never been directly disputed. Various text writers have hazarded the idea, however, that in particular cases dealing with contracts, because the court thought that injustice would otherwise be worked, it has felt at liberty to engraft exceptions upon it.

Professor Pepper has admirably treated the whole controversy between federal and state decisions in his little book, "The Border Land of Federal and State Decisions." He says that the Supreme Court, because of some fancied supervision over contract rights, have broken through the rule in some instances.

It is submitted that while in very many cases expressions have been let fall by the courts, which seem to justify such an observation, yet that those *decisions* are really founded upon a principle which does not in any way throw discredit upon the rule as above laid down. We hope to be able to show, not only on principle, but by authority, that in no instances are the federal courts at liberty to go to the length of foisting a law of their own construction upon a sovereign state. The establishment of this principle is so essential to the reasoning that follows, that a rather extended investigation may perhaps be permitted.

For a full discussion of the conflict between federal and state decisions, we cannot do better than to refer to Professor Pepper's book, mentioned above. It may not be amiss, however, to briefly recapitulate the general principles, in order to

prepare the way for a more detailed examination in the case of statutory construction.

The circuit courts of the United States were primarily established, that an impartial tribunal might be provided, wherein citizens of different states might obtain justice, unbiased by the influences surrounding the state courts. These courts, therefore, were to administer the laws of the state in which they were sitting, and not to expound it for themselves; but this rule, while strictly true as above stated, requires a further explanation. By "laws of the state" in this sense are meant laws purely local in their character. Laws originated by the state, and peculiar to it, as opposed to general laws, which may have been adopted and applied by state courts. These two classes of laws were early distinguished and will be incidentally referred to in tracing the growth of the principle involved.

(a) Where the law was essentially a law of the state, deriving its validity from the state, and applied peculiarly within it.

(b) Where the law was a general one, equally applicable to all the states unless altered by legislation.

In the former case it is perfectly plain that the state law is binding on the federal courts, when they profess to be administering the law of the state. In the second case, although the rule is well settled, the principle is not quite so plain.

On the one hand, it is contended that whether the law originated within or without the state, if it has been adopted by the state tribunals, and applied within the limits of their jurisdiction, it becomes a law of the state, just as much in the latter case as in the former; that the law as thus construed is just as binding within the state, and should be as conclusive on the federal courts, as though it were a positive statutory enactment.

On the other hand, it is admitted that where a law is promulgated by the state, either by legislative enactment or by virtue of local real-property rules, the state court is the ultimate judge of its meaning and construction. In such a case, it is said, the court has the authority to declare, as a finality, what the law is. Its judgment is not open to question by



any other court in existence. But it is otherwise if the state court passes upon the meaning of a general law. Here it has no especial authority to interpret. It may declare its opinion, which is binding within the state, but not upon courts having concurrent jurisdiction. In the one case the state court announces what the law is. In the other it expresses its opinion.

As will be noticed from an examination of the cases, the courts have adopted the latter view. This position has been the mark of much criticism by text writers. We do not feel competent to express an opinion, knowing that to do so would be to oppose at least some eminent writers, who seem not always to agree. As this paper concerns only a particular branch of the local law, it is not necessary to continue further this phase of the discussion.<sup>1</sup> Whether the federal courts are justified in refusing to follow in cases involving questions of general law, cannot affect the point which it is here proposed to establish, as we shall confine the discussion to cases involving the interpretation of state statutes. As will be shown later, the interpretation becomes a part of the statute, so that the federal courts are no more at liberty to disregard it, than they are to disregard the positive statutory enactment. A federal court may, for constitutional reasons, refuse to *apply* a state law as construed by a state court, but the federal court must follow the state interpretation.

One of the earliest cases to lay down this rule was *McKeen v. DeLancy's Lessee*,<sup>2</sup> in which Mr. Chief Justice Marshall declared that while *his* construction of a Pennsylvania statute under consideration would differ from the one given to it by the Supreme Court of Pennsylvania, yet he considered himself bound to follow the state construction, saying: that if a contrary rule were adopted, "infinite mischief would result."

The same principle was again recognized in 1817, in the case of *Shipp v. Miller's Heirs*.<sup>3</sup> Mr. Justice Story, delivering the opinion, says, referring to a decision of the Kentucky Supreme Court, "this is a decision upon a local law, which

<sup>1</sup> See "The Borderland of Federal and State Decisions,"

<sup>2</sup> 5 Cr. 22 (1809).

<sup>3</sup> 2 Wheat. 315 (1817).

forms a rule of property, and this court has always held in the highest respect decisions of state courts on such subjects. We are satisfied it is a reasonable interpretation of the statute, and upon principle or authority we see no ground for drawing it into doubt."

It will be noticed that the language of the eminent justice was here not so clear and decided, as will be shown in later cases. He declares that the Supreme Court accepts the state construction, both because the state is entitled to construe her own laws, and because the construction was "reasonable." The language of the same judge in later cases shows that he adopted the view that the federal court was bound to follow and adopt local state laws, both as to the act itself, and its construction, whether reasonable or not.

The next important case was *Polk's Lessee v. Wendell*,<sup>1</sup> in which a question arose as to the construction of a property right by the court of Tennessee. The court say, "We will respect the decisions of the local tribunals, but there are limits which no court can transcend." This language sounds as if the learned justice intended to arrogate to the United States court the ultimate construction of a local law, if they were of the opinion that the limits had been "transcended." However, the remark is deprived of some of its force by the next sentence, "But the courts of Tennessee have not so decided." Mr. Justice Johnson, who delivered the opinion, seemed to be a little fearful of committing himself openly to the doctrine that the federal courts are compelled to follow in all cases of local law.

However, all doubt was set at rest by the next decision, delivered in 1825, when the court definitely and clearly announced its inability to interpret state laws. This was the case of *Elmendorf v. Taylor*,<sup>2</sup> which was an appeal from the Circuit Court of Kentucky. A bill in equity was brought to compel a conveyance of land. The defendants relied upon their patent. The plaintiff relied upon his entry, and to sub-

<sup>1</sup> 5 Wheat. 293 (1820).

<sup>2</sup> 10 Wheat. 159 (1825).

stantiate it, upon certain acts of the legislature, by virtue of which he contended he had a good title. The construction of these acts was one of the questions at issue. The court decided that the construction given by the Supreme Court of the state was binding upon them. Chief Justice Marshall delivered the opinion of the court. On page 159 he says: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

As far as we are aware, this was the first decision to lay down this rule in so definite and unqualified a manner. The language of the court was here capable of perhaps even broader application than later decisions approve, but while its scope may have been narrowed, its soundness has never been questioned. Two years later (1827) the now well-settled principle that the federal courts are bound to follow local laws of real property, even though they do not depend on statute law, was definitely expressed. This was in the case of *Jackson v. Chew*.<sup>1</sup> The case came up on a writ of error to the Circuit Court for the Southern District of New York. It involved a dispute over the meaning of a clause in a will. As was pointed out by Mr. Justice Thompson, in delivering the opinion of the court, the law of New York had been firmly

<sup>1</sup> 12 Wheat. 162 (1827).

settled on that point. The court felt bound to follow the interpretation put upon these words by the state court, and rested their decision on that ground. It was contended in the argument that the rule that the federal courts are bound to follow the state courts, applies only to cases of constructions of state statutes or constitutions. The court, however, while admitting most of the decided cases to be of that nature, say, "But the same rule has been extended to other cases, and there can be no good reason assigned why it should not be, when it is applying settled rules of property. This court adopts the state decisions, because they settle the law applicable to the case, and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands." This case also, it will be noted, recognizes the rule as well settled in cases involving statutory construction. It is cited as of interest in tracing the development of the principle under discussion.

During the fifteen years following *Jackson v. Chew*, no less than eight well-considered cases unqualifiedly affirmed the principles expounded in *Elmendorf v. Taylor*.<sup>1</sup>

The principle is so well and so emphatically laid down in *Green v. Neil's Lessee*<sup>2</sup> that the case is here stated, though it will be again touched upon later. *Green v. Neil* came to the Supreme Court by a writ of error to the Circuit Court of the

<sup>1</sup> *Shelby v. Guy*, 11 Wheat. 361 (1826), Johnson, J., "That the statute law of the states must furnish the rule of decision to this court, . . . no one doubts;" *Gardner v. Collins*, 2 Pet. 58 (1829), Story, J.; *McClung v. Silliman*, 3 Pet. 270 (1830), M'Lean, J., "The state construction is the law of the forum;" *United States v. Morrison*, 4 Pet. 124 (1830), Marshall, C. J.; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99 (1830), Thompson, J.; *Ross v. M'Clung*, 6 Pet. 283 (1832), Marshall, C. J., "The questions which grow out of the language of the act, so far as they have been settled by judicial decisions (referring to state decisions), cannot be disturbed by this court;" *Green v. Neil's Lessee*, 6 Pet. 291 (1832), M'Lean, J.; *Bank of United States v. Daniel*, 12 Pet. 32 (1838), Catron, J.; *Ross v. Duvall*, 13 Pet. 45 (1839), M'Lean, J.; *Harpending v. Dutch Reformed Church*, 16 Pet. 455 (1842), Catron, J.; (only the principal cases which we have examined are cited. They may not include all the cases decided during this period which bear on the question).

<sup>2</sup> *Supra*.

United States, for the District of West Tennessee. It was an action of ejectment. The defendant claimed title by limitation. The plaintiff disputed his claim, not on a question of the facts, which were admitted, but on a question of construction of the Tennessee statute of limitations. Some years prior to the suit in question, a construction favorable to this plaintiff had been adopted by the Supreme Court of Tennessee, and followed by the Supreme Court of the United States. The Circuit Court felt bound to follow these decisions, and directed a verdict for the plaintiff, which was the cause of error assigned. The Supreme Court of Tennessee had, subsequent to the above mentioned decision, reversed its previous ruling and adopted a construction of the statute of limitations which was favorable to the defendant in this case. On this writ of error the Supreme Court of the United States declared itself bound to adopt the last construction put upon the statute by the state court, reversed its own decisions and sent the case back for a new trial. Mr. Justice McLean, for the court, says (star p. 298): "The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a state, as great in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case, as well as in the other, has the effect to establish in the state two rules of property.

"Would not a change of construction in a law of the United States, by this tribunal, be obligatory on the state courts? The statute as last expounded would be the law of the Union? and why may not the same effect be given to the last exposition of a local law by the state court? *The exposition forms a part of the local law*, and is binding on all the people of the state, and its inferior judicial tribunals. It is emphatically the law of the state, which the federal court, while sitting within the state, and this court, when a case is brought before them,

is called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the state may modify the law or repeal it.

*"If the construction of the highest judicial tribunal of the state form a part of its statute law, as much as an enactment of the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should by construction give a different effect to a statute, from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law, and yet they reject the exposition of that law, which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the state at the time the decision is made? This constitutes the rule of property within the state, by which the rights of litigant parties must be determined."*

It will be noted that this case puts a state court's construction of state laws upon the same plane as the statute itself. Each is equally conclusive as to what is the law of the state. It follows, therefore, that *a federal court cannot disregard the former any more than it can the latter* when it is administering state law.

Up to this point the courts have applied this doctrine generally to the law of the state, without going into distinctions as to what is, and what is not, local law. However, in 1842, the famous case of *Swift v. Tyson*<sup>1</sup> was decided, which limited the rule in terms to statute law and local laws of real property. That case came up on a writ of error to the Circuit Court for the District of New York. It was an action on a bill of exchange. The question certified to the Supreme Court for

<sup>1</sup> 16 Pet. 1 (1842), Story, J.

decision was whether the plaintiff, who had received a note in payment of a pre-existing debt, was a holder for value. The earlier decisions of the Supreme Court of New York seemed to decide that, under such circumstances, he was. Later decisions oscillated to some extent, but seemed to return at the last to the original view. The question then arose as to whether the United States Court would follow the New York view of the law. Waiving the question as to whether the rule was actually settled in the New York courts, Mr. Justice Story declared that, for the purposes of this case, the point was of no vital importance because, at any rate, the United States courts were not bound by the decisions of the New York courts. He pointed out that the decision of this question involved no statute or local law of New York. That it was purely a case to be decided on principles of general commercial law. That such had been the view of the New York courts in rendering their decisions. They did not, and could not, claim any authority so to settle a question of general law as to bind the courts of the United States.

Prof. George Wharton Pepper, in his work entitled "The Border Land of Federal and State Decisions," has very severely criticized the opinion of Mr. Justice Story in this case. Professor Pepper points out, among other things, that it was the intention of the founders of the Constitution for the federal courts in such cases to administer solely the laws of the state. That they were not, in any sense, to investigate the law for themselves, but to devote their whole energy to an effort to discover what the law of the state might be. There can be no doubt of the correctness of this statement. It is respectfully suggested, however, that *Swift v. Tyson* does not necessarily contradict that intention. It does not deny the duty of the federal courts to follow the state courts' construction of laws peculiarly state laws. What it does decide is, that general commercial law is not state law. Whether the founders of the Constitution intended to make that distinction, or whether they could have realized its importance at that time, had it been brought before them, may, perhaps, be disputed.

As the discussion of this and similar decisions is only inci-



dental to the line of argument in this paper, it is not proposed to go into this case on principle.

*Apropos* of Professor Pepper's suggestion as to the early views of the functions of the Supreme Court, however, it is interesting to note that, in the earlier cases which we find reported, the judges do not seem to be at all sure that they are absolutely bound to follow the state courts, though they profess the "highest respect" for their judgment.<sup>1</sup> Indeed, Professor Pepper, himself, points out a very early case, *Wilson v. Mason*,<sup>2</sup> in which the principle seems to be not admitted. It was not until the case of *Elmendorf v. Taylor*<sup>3</sup> (1825), that the court definitely declared the doctrine to be settled.

As the opinion in *Swift v. Tyson* contains a clear exposition of the duty of the court to adopt state decisions in cases involving strictly local law, we insert here an extract from it: "It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides "that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws" in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are; and are not of themselves laws. They are often re-examined, reversed and qualified by the

<sup>1</sup> See *M'Keen v. DeLancy's Lessee* (1809); *Shipp v. Miller's Heirs* (1817); *Polk's Lessee v. Wendell* (1820); *Supra*, pp. 478, 479.

<sup>2</sup> 1 Cr. 24.

<sup>3</sup> *Supra*, p. 479.

courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, *and the construction thereof adopted by the local tribunals.*"

Before leaving this phase of the subject it may not be out of place to remark that, as far as we are able to say, after making a diligent search, no Supreme Court decision has ever thrown discredit upon *Swift v. Tyson*, though it has been the mark of some adverse criticism both by text writers and by a few state courts.<sup>1</sup> Whether *Swift v. Tyson* is right or wrong cannot affect the principle under discussion, because the case expressly admits that the federal courts are bound to follow in all cases of purely local law.

Up to this point we have shown that in cases involving local law, by which is meant statute law and laws involving local real property rules, the federal courts are bound to accept the interpretation of the state court as final. We

<sup>1</sup> In *Forepaugh v. R. R.*, 128 Pa. 217 (1889), McCollum, J., declared that the distinction laid down in *Swift v. Tyson* was illogical and unsupported either by reason or authority. The state courts generally have adopted the rule, that the law of the place where the contract was made should govern, and do not seek to follow the lead of the federal courts, and interpret such questions for themselves.

On the other hand, the federal courts have steadily adhered to the doctrine as laid down in *Swift v. Tyson*. In the following five leading cases, the doctrine is re-affirmed with great emphasis, the cases dating from 1855 to 1893: *Watson v. Tarpley*, 18 How. 517 (1855), Daniel, J.; *Chicago v. Robbins*, 2 Black, 418 (1862), Davis, J.; *R. R. v. Lockwood*, 17 Wall. 357 (1873), Bradley, J.; *Town of Venice v. Murdock*, 92 U. S. 494 (1875), Strong, J.; *Liverpool Steamship Co. v. Phoenix Ins. Co.*, 129 U. S. 397 (1888), Gray, J. "In questions of commercial law, United States courts will not follow state courts, even when they obtain jurisdiction by diverse citizenship:" *The Guildhall*, 58 Fed. 796 (1893), Brown, J.

now meet a qualification, if such it may be called. About the same time as *Swift v. Tyson*, the case of *Groves v. Slaughter*<sup>1</sup> was decided. It laid down the perfectly plain proposition, that when there are no state decisions to aid the federal court in its investigation of the law of the state, the federal court must construe for itself. This does not mean that the federal court engrafts a law, or an interpretation of a law upon a state. It means merely, that where it has no light from state decisions, to use the court's expression in *Groves v. Slaughter*, it must seek the interpretation from the ordinary rules of the common law. Then if the state court puts a different construction upon the statute, the federal court must change its view and follow suit.

It remains only to examine further authorities in support of the rule thus narrowed in its application. The law on this point is so well settled that it would be vain to cite further authorities, were it not for the desirability of establishing not only the general principle, but also the exact import and significance of the rule as laid down by the courts, in both majority and minority opinions.

In *State Bank of Ohio v. Knoop*,<sup>2</sup> Mr. Justice McLean for the court, says, "The rule observed by this court to follow the construction of the statute of the state by its Supreme Court, is strongly urged. This is done when we are required to administer the law of the state. The established construction of a statute of the state is received as a part of the statute." The court then went on to distinguish the case before it, but did not question the rule in cases where the federal court is administering the law of the state.

In a dissenting opinion in the same case, Mr. Justice Catron observed: "If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity that I suppose could exist with any one, is that the construction is

<sup>1</sup> 15 Pet. 449 (1841).

<sup>2</sup> 16 How. p. 369 (1853), M'Lean, J.

not settled. . . . Whether this construction given to the State Constitution is a proper one is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us than state courts and judges can question our construction of the Constitution of the United States."

In *Gelpcke v. Dubuque*, Mr. Justice Miller, dissenting, declared that "the general principle is not controverted by the majority; that to the highest court of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or with some law or treaty made under it. Nor is it denied that when such a construction has been given by the state court, that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively, for all other courts, the Constitution and laws of the Federal Government."

The cases dealing with the naked principle are so overwhelming in their approval, that it does not seem necessary or profitable to continue further an examination of the cases in the text. It may be well, however, to call attention to one later case, *Burgess v. Seligman*,<sup>1</sup> in which the principle was referred to as being free from doubt. Mr. Justice Bradley, delivering the opinion, pointed out that when the law had not been construed by the state court, the federal court might construe for itself, and then declaring it to be the duty of the federal court to follow where the law is settled, continues, "This is especially true with regard to the law of real estate and the construction of state statutes and constitutions. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."<sup>2</sup>

<sup>1</sup> 107 U. S. 20 (1882), Bradley, J.

<sup>2</sup> It is submitted that this case went too far in holding the law to be unsettled.

Without elaborating further on this phase of the question, a few additional cases are cited in the note. All of these have been examined, and in all of them it is emphatically asserted that the federal courts, except in the case mentioned above, are absolutely powerless to construe state statutes or state constitutions.<sup>1</sup>

We now approach that class of cases, represented by the principal case under discussion in this essay, where contract rights are involved. The decisions of this class have been the subject of much criticism, both hostile and favorable, ever since the first one of the line was decided. The principle upon which they are based seems to be hidden in mystery, if we are to judge from the various and miscellaneous opinions hazarded by text-writers. We desire to arrive at this principle partly by a process of exclusion. That is the purpose of this section, viz.: to show that the court could not possibly have arrogated to itself the right to construe a state law without deliberately overthrowing an overwhelming consensus of Supreme Court authorities. The examination of these cases will be postponed to the next section.

Before leaving the discussion of the rule enunciated at the

<sup>1</sup> *Porterfield v. Clark*, 2 How. 76 (1844), Catron, J.; *Nesmith v. Sheldon*, 7 How. 812 (1849), Taney, C. J.; *Williamson v. Berry*, 8 How. 495 (1850); *Van Rensselaer v. Kearney*, 11 How. 297 (1850), Nelson, J.; *Webster v. Cooper*, 14 How. 488 (1852), Curtiss, J.; *Beauregard v. New Orleans*, 18 How. 497 (1855), Campbell, J.; *Union Bank of Tennessee v. Jolly's Adm'rs*, 18 How. 503 (1855), Wayne, J.; *Amy v. Allegheny City*, 24 How. 364 (1860), Wayne, J.; *Rice v. R. R.*, 1 Black. 374 (1861); *Nichols v. Levy*, 5 Wall. 433 (1866), Swayne, J.; *Prov. Ins. Co. v. Mass.*, 6 Wall. 611 (1867); *Randall v. Brigham*, 7 Wall. 523 (1868), Field, J.; *Gut v. The State*, 9 Wall. 35 (1869), Field, J.; *Aicardi v. The State*, 19 Wall. 635 (1873), Swayne, J.; *R. R. v. Ga.*, 98 U. S. 359 (1878); *Baily v. Magwire*, 22 Wall. 215 (1874), Davis, J.; *Town of Venice v. Murdock*, 92 U. S. 494 (1875), Strong, J.; *Davis v. Indiana*, 94 U. S. 494 (1876), Miller, J.; *Stone v. Wisconsin*, 94 U. S. 156 (1876), Waite, C. J.; *East Oakland v. Skinner*, 94 U. S. 255 (1876), Hunt, J.; *Boyd v. Ala.*, 94 U. S. 645 (1876); *Town of South Ottawa v. Perkins*, 94 U. S. 261 (1876); *County of Leavenworth v. Barnes*, 94 U. S. 70 (1876); *Adams v. Nashville*, 95 U. S. 19 (1877); *Hall v. De Cuir*, 95 U. S. 485 (1877), Waite, C. J.; *Sanborn v. County Com.*, 97 U. S. 181 (1877); *R. R. v. Gaines*, 97 U. S. 697 (1878); *Fairfield v. Co. of Galatin*, 100 U. S. 418 (1879); *Lewisohn v. Steamship Co.*, 56 Fed. 603 (1893), Benedict, J.

head of this section, however, we may perhaps be pardoned a brief examination of its correctness, on principle.

It is obvious that it would be quite beyond the scope of this paper to go deeply into the question of the relative powers of the state and the Federal Government. It is plain, however, that the Government of the United States is one of purely delegated powers. It has not any inherent sovereignty over the people of the United States. It was created by the instrument which both confers and limits its powers. It follows that it possesses no powers, except those either expressly or impliedly conferred upon it, by the Constitution.

On the contrary, it is equally well settled that the states do possess an inherent sovereignty over their subjects. By adopting the Constitution they gave up to a central government, by them created, certain of their inherent functions. All the powers not so delegated were retained by the states.<sup>1</sup> This is true equally of any department, whether legislative, executive or judicial. This is clearly pointed out by Mr. Hamilton in the *Federalist*. He says: "The principles established in a former paper teach us that the states will retain all pre-existing authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the states; or where an authority is granted to the Union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as the latter. And under this impression *I shall lay it down as a rule, that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.*"<sup>2</sup>

If, by the Constitution, the states gave up the right which

<sup>1</sup> See Amendments to the Constitution of the United States, Art. X.

<sup>2</sup> The *Federalist*, No. LXXXII, pp. 572-3.

they possessed, to construe their own laws, then the federal power must exercise this duty. If, on the other hand, such right was not delegated to the Federal Government, then it can possess no such right. It either was, or was not, so delegated. It must be either one or the other. It might be delegated, very possibly, in some instances and not in others; but in any given situation the federal courts' right to construe must be derived from the Constitution, or it does not exist. There can be no discretionary power, because of a "fancied supervision over contracts," or for any other reason. This seems almost too plain for argument.

It is scarcely necessary to refer to the constitutional provisions, for it has never even been claimed that such rights were delegated to the Federal Government. In Art. III, Section 2, the cases in which the federal courts shall have jurisdiction are enumerated. Among these is not a provision that the federal courts shall construe state statutes, neither is there any mention of a "general supervision over contracts" granted to these courts. The right of a state to interpret its own laws is inherent and exclusive. The situation is precisely the same as if the two courts belonged to different nations. This analogy was drawn in *Elmendorf v. Taylor*.<sup>1</sup> As pointed out above, the court say in that case "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

Cooley, in his book on "Federal Limitations," lays down the rule as follows: "But the same reasons, which require that the final decision upon all questions of national jurisdiction should be left to the national courts, will also hold the national

<sup>1</sup> *Supra*, p. 479.



courts bound to respect the decisions of the state courts, upon all questions arising under the state constitutions and laws, where nothing is involved of national authority, or of right under the constitution, laws, or treaties of the United States; and to accept the state decisions as correct and to follow them, whenever the same questions arise in the national courts."<sup>1</sup>

The same thought is expressed throughout his work by Hon. J. I. Clark Hare. He says (p. 23) that the national Government "would be supreme throughout the whole range of its powers, but yet being confined within fixed limits, would not divest the jurisdiction of the states over the matters committed to their care. State sovereignty would remain, although curtailed in its proportions."<sup>2</sup>

This principle is so well settled as to be not open to doubt. As the state is not given up its inherent right to construe its own laws, its right is paramount and exclusive.

The idea that the federal courts are bound to follow state decisions as a matter of obligation Professor Pepper (p. 71) declares has been absolutely repudiated by the courts. In view of such an expression by an author, whose opinion is so eminently worthy of careful consideration, it is with great hesitation that we acknowledge holding a contrary view.

When one glances over the field of conflict, he is irresistibly impressed, at first, with the thought that the federal courts have, as it were, taken the bit in their teeth and brushed aside all restraining power, breaking through the rules at will. A more careful examination will, however, show more of method than at first glance appears.

We see first a group of cases, where the questions involved are confined to *local* law as heretofore explained. We have yet to see the first case which shakes the rule that the federal court is bound to follow; the reason uniformly given for this obligation is that the federal court is as fully bound to apply the construction as to apply the law itself, by reason of the state's sovereignty in that field.

We next perceive a group, which the courts have said,

<sup>1</sup> Cooley's "Federal Limitations," p. 20-21.

<sup>2</sup> Am. Const'l Law, pp. 23.

rightly or wrongly, do not involve questions of local law. Here, obviously, the state decisions are not followed, but the principle is not denied.

Lastly we see a group in which the federal courts have refused to *apply* a state court's change of interpretation because such later interpretation, thus applied, would infringe some clause of the federal Constitution. To this latter class belong the cases represented by *Gelpcke v. Dubuque*. To show this shall be the purpose of the next section.

*Thomas Raeburn White.*

(To be continued.)

## A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART II.

The Congress of 1774 adjourned on October 20th of that year, and the delegates returned to their homes; before the assembling of the next Congress, in May, 1775, events in Massachusetts, culminating in the battle of Lexington on April 19, 1775, had brought the people face to face with the question of peace or war—war against the King to whom they had so recently avowed their allegiance. And the attitude at once assumed by the Congress of 1775 is markedly different from that of the last Congress.

The delegates to it, with the exception of those from New York, had all been appointed before the affair at Lexington. The delegations were appointed in much the same manner as those to the former Congress. Very many of the same men were again chosen to represent their respective colonies, although there were changes both in the personnel and number of the delegates. Massachusetts took occasion to commend the work of the last Congress, in the "credentials" of her delegation, and North Carolina sent with those of hers a commendatory resolution of the Assembly. But for the most part the delegates were simply empowered to represent the colony, and act with their fellow-members for the general good.

Peyton Randolph, of Virginia, who had been President of the former Congress, was again chosen, and served until his death in October, 1775, when he was succeeded by John Hancock. The purpose for which this Congress assembled, if judged by the "credentials" of its members, was, broadly speaking, the promotion of the general good. In only four instances—New York, Delaware, Rhode Island and Georgia—is mention made of a desire for restoration of harmony with Great Britain, and in the case of Rhode Island this desire is expressed indirectly. It is worthy of notice in passing that this time the credentials are attested merely by the Secretary, and not by the Governor-General. There were, on the other

hand, no instructions to any delegation to advocate extreme measures, or to do anything of a really revolutionary character. The grand object to be attained is the redress of grievances and the establishment of American rights on a sound and unshakable "constitutional" basis. We shall see how Congress actually proceeded. In the first place, as in the former Congress, each colony had one vote. And, as in the former Congress, it was agreed to sit with closed doors. After the reading of the credentials, the letter of the London agents, telling of the refusal of Parliament to receive the petitions and of their resolve to send forces to America to enforce obedience to the objectionable laws, was read; and then a communication from the Provincial Congress of Massachusetts, telling of the outbreak of hostilities, and of the action of that province in raising a large force, and exercising this action *without the advice of the General Congress* on the ground of imperative necessity; and, "with the greatest deference," suggesting that a "powerful army on the side of America" is the only means to "stem the progress of a tyrannical ministry." Still, however, they profess loyalty to the King in express terms, in the address to the people of Great Britain, a copy of which they sent to Congress. Congress at once resolved itself into a committee of the whole to take into consideration the State of America, and referred the other communications from the Massachusetts Congress to that committee. Later on, a similar communication was received from New York, and New Jersey sent to Congress for consideration a plan of accommodation submitted to the assembly of that colony by the Governor. Naturally, under the circumstances, the general control of affairs was at once assumed by Congress, which proceeded to devise measures for putting the country into a state of defence; and to authorize and direct the raising of a Continental army; and to establish a postal service. In most instances, the resolutions took the form of "recommendations" to the various colonies. With regard to the raising of troops, they resolved upon the raising by enlistment of a number of companies in several colonies, to join the existing forces near Boston. The form of enlistment prescribed speaks of "The American Continental

Army ;" and having unanimously chosen " George Washington, Esq.," " General," they proceed to provide for the appointment of a certain number of Major-Generals, Brigadier-Generals, etc.—a full army organization—with a salary affixed to each rank. The commission of General Washington is so clear and positive in its terms, as to read like the pronouncement of a Sovereign. I give it in full :

" IN CONGRESS.

*" The Delegates of the United Colonies of New Hampshire, Etc.*

" TO GEORGE WASHINGTON, Esq.

" WE, reposing special Trust and Confidence in your Patriotism, Valour, Conduct, and Fidelity, do, by these Presents constitute and appoint you to be General and Commander-in-Chief of the Army of the United Colonies, and of all the forces now raised or to be raised by them, and of all others who shall voluntarily offer their service, and join the said Army for the Defence of American Liberty, and for repelling every hostile Invasion thereof. And you are hereby vested with full Power and Authority to act as you shall think for the good and welfare of the Service.

" And we do hereby strictly charge and require all Officers and Soldiers under your Command, to be obedient to your Orders, and diligent in the Exercise of their several Duties.

" And we do also enjoin and require you, to be careful in executing the great Trust reposed in you, by causing strict Discipline and Order to be observed in the Army, and that the Soldiers be duly exercised and provided with all convenient Necessaries.

" And you are to regulate your Conduct in every respect by the Rules and Discipline of War (as herewith given you) and punctually to observe and follow such Orders and Directions from time to time, as you shall receive from this or a future Congress of these United Colonies, or Committee of Congress.

" This Commission to continue in Force until revoked by this or a future Congress."

This was submitted to Congress and agreed on June 17..

1775, when the session was about five weeks old. Meantime they had, as before stated, determined upon measures of defence for the country, resolved to raise an army, to establish posts, and now proceeded to devise ways and means to raise money; and resolved (June 23d) to emit bills to the amount of \$2,000,000 in the following form :

CONTINENTAL CURRENCY.

No.	DOLLARS.
<i>This Bill entitles the Bearer to receive.....</i>	
<i>Spanish milled Dollars, or the value thereof in Gold or Silver according to the Resolutions of the Congress held at Philadelphia on the 10th day of May, A. D. 1775.</i>	

They resolved also that the confederated colonies be pledged for their redemption. The “ Rules of War ” were most elaborately prescribed, eighty-nine in number, to which were added sixteen more shortly afterwards. And they are just what they profess to be—rules regulating the conduct of an army—that is, a national armed force. They also, a little later, “ recommended ” to the various colonies the organization of “ militia ”—a distinct body of men from the Continental army.

With so much of a sovereign character done while Congress was yet so young, it of course followed that they should amplify and perfect their work. Accordingly, as the session progressed, they apportioned the redemption of the bills emitted among the colonies, but obligating the United Colonies for so much of its quota as a particular colony might fail to discharge. And they resolved that the provincial assemblies should levy taxes especially to meet these bills. This term they do not “ recommend,” they simply “ resolve ” that the assemblies shall levy the tax. They also established a Continental Treasury at Philadelphia, with two joint treasuries, and a postal department, also at Philadelphia, with a Postmaster-General at the head of it. They also, in view of the fact that the friendship of the Indians was important, took Indian affairs into their own hands. In spite, however, of all these significant facts, there can be no doubt that a permanent separation from Great Britain was not yet at all generally thought of or

desired—quite the contrary. On July 8, 1775, almost exactly a year before the Declaration of Independence, they again address the King as his “faithful subjects” and say, among other things, “Attached to your Majesty’s Person, Family, and Government with all Devotion that Principle and Affection can inspire, connected with Great Britain by the strongest Ties that can unite Societies, and deploring every Event that tends in any degree to weaken them,” etc., etc. And on the same day, in an address to the inhabitants of Great Britain, whom they address as *Friends, Countrymen and Brethren!* they say “We are accused of aiming at Independence; but how is this accusation supported? By the allegations of your ministers—not by our actions.” And a little later on, after speaking of the hostilities, “Yet give us leave most solemnly to assure you, that we have *not yet* (italics mine) lost sight of the Object we have ever had in View, a Reconciliation with you on constitutional Principles,” etc. And on the same day—a great day for “addresses”—they tell the Lord Mayor of London: “North America, my Lord, wishes most ardently for a lasting connection with Great Britain on Terms of just and Equal Liberty” and they tell the inhabitants of Ireland three weeks later that they will “cheerfully bleed in defence” of the King in a righteous cause. They also say, somewhat significantly, “Blessed with an indissoluble union, with a variety of internal resources,” they feel confident of “rising superior to the machination of evil and abandoned ministers.”

On August 1st Congress adjourned until September 5th.

Mr. John Adams, writing to his wife on June 17th, says he found this Congress like the last—“a strong jealousy of us from New England, and of Massachusetts in particular. Suspicions entertained of designs of independency; an American republic; presbyterian principles, and twenty other things”—but he adds that the longer they sat the more the necessity for vigorous action was seen on all sides; and in his next letter, June 18th, he says that the whole Continent is as forward as Boston. Franklin, according to the same authority, in the latter part of July, 1775, considered Congress too irresolute, and that the country was in an odd state, neither at



peace nor at war, neither dependent or independent, and that more positive action was likely to follow soon, "and that even if we should be driven to the disagreeable necessity of assuming a total independency, and set up a separate state, we can maintain it." ("A separate state"—"we can maintain it.")

Meantime, the situation of the colonies was, of course, uppermost in the minds and hearts of the people. In many of them, though not in all, the proceedings of the Congress of 1774 were heartily and expressly approved, and the various newspapers were filled with letters, generally signed with some pseudonym, for or against the general course pursued and evidently to be pursued. Those who called themselves "moderates" were never tired of accusing their adversaries of aiming at independence—a charge which was indignantly repelled. Many of the letters on both sides are most ably written, but can only be referred to here. In one of several interesting communications to the Pennsylvania Gazette, "Camillus," on March 1, 1775, used the deadly parallel column to set before us most clearly the difference in the recognized rights of an Englishman and an American. I reproduce the columns *verbatim et literatim*:

## IN ENGLAND.

1. A tryal by a jury of his country, in all cases of life and property.

2. A tryal where the offence was committed.

3. The civil authority supreme over the military, and no standing army in time of peace kept up, but by the consent of the people.

4. The Judges independent of the Crown and people.

## IN AMERICA.

1. A tryal by jury only in some cases, subjected in others to a single Judge or a Board of Commissioners.

2. A tryal, if the Governor pleases, 3000 miles from the place where the offence was committed.

3. The military superior to the civil authority, and America obliged to contribute to the support of a standing army, kept up without and against its consent.

4. The Judges made independent of the people, but dependent on the Crown for the support and tenure of their commissions.

5. No tax or imposition laid, but by those who must partake of the burthen.

6. A free trade to all the world except the East Indies.

7. A free use and practice of all engines and other devices, for saving labour and promoting manufactures.

8. A right to petition the King, and all prosecutions and commitments therefore illegal.

9. Freedom of debate and proceedings in their legislative deliberations.

10. For redress of grievances, amending, strengthening, and preserving the laws, parliaments to be held frequently.

5. Taxes and impositions laid by those, who not only do not partake of the burthen, but who ease themselves by it.

6. A trade only to such places as Great Britain shall permit.

7. The use only of such engines as Great Britain has not prohibited.

8. Promoting and encouraging petitions to the King declared the highest presumption, and the legislative Assemblies of America dissolved therefore in 1768.

9. Assemblies dissolved, the legislative power suspended, for the free exercise of their reason and judgment, in their legislative capacity.

10. To prevent the redress of grievances, or representations tending thereto, Assemblies postponed for a great length of time, and prevented meeting in the most critical time.

Of course the anomalous condition described by Franklin could not continue—and surely, albeit unconsciously, the colonies were drifting toward an assertion of their independence. The half year from the fall of '75 to the spring of '76 was big with events—it would be interesting to trace their progress—and, at last, forced by circumstances, the colonies resolve to separate themselves definitely and finally from all political connection with Great Britain.

They had by this time become accustomed to united action and to the exercise, collectively, of sovereign powers. Their ideas of their just and inalienable rights had grown more and more clear, as they were stated again and again in speeches, in printed addresses and petitions, in letters to the public press. And they were now to perform the solemn and momentous function of bringing into the world a new political entity—a possible Frankenstein among the nations—certainly an entity

utterly different, organically, from any existing or previously existing state. Yet resembling all, of course, in those attributes without which a state cannot be a state.

On the tenth day of May, 1776, the impossibility of the continuance of existing conditions was expressly recognized in Congress. It was declared that it was "irreconcilable to reason and good conscience" that people should longer take oaths and affirmations necessary for the support of any government under the British Crown. And that British authority ought to be supplanted by a government of the people of the colonies.

They further recommended the several colonies to adopt such form of government as would best conduce to the well-being of their citizens and of America in general. This was, of course, merely preliminary. On June 7th, Virginia and Massachusetts, represented by Mr. Richard Henry Lee and Mr. John Adams, took the lead by respectively offering and seconding a resolution "That these United Colonies are and of right ought to be free and independent states; and that all political connection between them and the State of Great Britain is, and ought to be, totally suppressed." After three days debate in committee of the whole, a committee of five members, Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and R. R. Livingston, were instructed to prepare a declaration "That these United Colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown; and that all political connection between them and the State of Great Britain is, and ought to be, dissolved"—a slight amplification of the resolution originally offered by Mr. Lee. But even now, while realizing the necessity for prompt action, there was no undue haste. Every step was deliberately taken. The people of the colonies were given time to instruct their delegates. Mr. Lee's motion was for this purpose postponed until July 1st. It was assented to on July 2d by all the colonies except Delaware and Pennsylvania. Two days later, the Declaration of Independence, as we know it, was adopted without a dissenting voice—it had been reported substantially

by the committee on June 28th—and was at once made public.

The political and constitutional effects of this step were, of course, many and radical. It was pregnant of further effects which none could foresee, and we can well imagine with what profound anxiety, mingled with hope and fear, it was regarded by the thinking minds of the day. Mr. Curtis in his "History of the Constitution" thus summarizes these effects: "It at once severed the political connection between this country and the people of England, and at once erected the different colonies into free and independent states. The body by which the step was taken constituted the actual government of the nation at the time, and its members had been directly invested with competent legislative power to take it, and had also been specially instructed to do so. The consequences flowing from its adoption were that the local allegiance of the inhabitants of each colony became transferred and due to the colony itself—or, as it was expressed by Congress, became due to the laws of the colony, from which they derived protection; that the people of the country became thenceforth the rightful sovereign of the country; that they became united in a national capacity as one people; that they could thereafter enter into treaties and contract alliances with foreign nations, could levy war and conclude peace, and do all other acts pertaining to the exercise of national sovereignty; and, finally, that in their national capacity they became known and designated as the United States of America." Without assenting to all of his propositions as to the effects of the Declaration of Independence, it may be said that Mr. Curtis has brought out very clearly the great general change wrought by it. It must have seemed to the men of the day like leaving an anchorage no longer tenable and setting out upon an almost unknown sea. It is quite certain that all the consequences mentioned by Mr. Curtis were not realized at the time, and would not have been relished in all quarters if they had been.

The importance of a closer and more binding association of the colonies than the loose one of their being represented in a joint Congress, and together contending, by force of arms, against a common foe, in view of the impending formal sev-

erance of the tie with Great Britain, was fully realized by Congress. So much so, that on the very day on which the committee to prepare the declaration was appointed, another committee, consisting of one delegate from each colony, was appointed to "prepare and digest the form of a confederation to be entered into between these colonies." Now, if the Declaration itself was intended to have the effect of making the colonies united in a national capacity as one people, as Mr. Curtis says, no articles of confederation would have been necessary. It is evident that the effect of the Declaration in that regard was thought to be rather the disintegrating of the continent into thirteen absolutely independent sovereignties—alleged, it is true, for a common cause at the moment, but still freed from their one political bond—allegiance to the British Crown—and more than ever totally independent of each other. The wording of the resolution of June 24th (that on the subject of the status of individuals in the various colonies), shows two things, as it seems to me—first, that each colony was independent of every other, and, second, that either the very idea of "allegiance," as we understand the term, had become repugnant to them, or that they were not willing to express, clearly and unambiguously, the thought that each colony was not only independent but a nation in itself. Here is the resolution: "All persons abiding within any of the United Colonies, and desiring protection from the laws of the same, owed allegiance to the said laws, and were members of such colony; and that all persons passing through or making a temporary stay in any of the colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owed, during the same time, allegiance thereto." Of course, obedience to the laws is incumbent upon anybody within the territory wherein the laws are in force; and yet what more is the meaning of this resolution? If allegiance to the *government* of a colony was meant, why not say so? The sole distinction in the resolution between residents and non-residents is, that the former are declared to be "members" of the colony, while the latter are not; but the same "allegiance" is declared to be due from each alike.

In a second paragraph it is declared that "all persons, *members of, or owing allegiance to*, any of the United Colonies," in any way give aid and comfort to the enemies of the said colonies "within the same," are guilty of treason against *such colony*. They recommend to the legislatures the enactment of laws punishing treason.

The Declaration of Independence, of course, deserves the closest scrutiny. It is an important indicium of the degree of national unity which was in the minds of the foremost men of the day at the moment of the separation from England. It is made by the representatives of the *United States* (the first official use of that designation), "in the name and by the authority of the people of these colonies," and it declares the colonies to be free and independent states, and, as free and independent states, "to have full power to levy war," etc., and do all other acts and things which independent states may of right do. The wording of the Declaration has given rise to much controversy, but, while its true meaning is important, it must not be forgotten that it was *not* the Constitution; and its meaning, when ascertained, is by no means a conclusive argument for any particular interpretation of the Constitution.

*Lucius S. Landreth.*

(To be Continued.)

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### AGENCY.

B, a manufacturers' and packers' agent, entered into a contract with A, a manufacturer of gelatine, whereby it was provided that A should use his best efforts to push the sale of B's gelatine throughout the United States; that A should not sell any gelatine of persons other than B; that B should keep A as his sole agent for the period of five years; that B should receive a percentage on all sales as his only compensation; and that he should receive an additional percentage for collecting unpaid bills. On the death of A, B had a large quantity of gelatine on his hands, and the question was whether the contract was terminated by A's death.

The Supreme Court of Massachusetts held that it was of such a nature as to admit only of personal performance; that the contract on B's part was one merely of agency; that it contemplated only the personal services of the agent, B, under the personal supervision of the master, A, and therefore it ended on A's death, by virtue of the familiar law of agency, that a contract of agency terminates on the death of the principal. A's executor was therefore entitled to recover the unsold gelatine in B's hands: *Brown v. Cushman*, 53 N. E. 861.

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#### ATTORNEY AND CLIENT.

While a contract for a contingent fee will be upheld in Illinois, yet the attorneys should be wary of entering into such agreements when one of the conditions is that the attorney shall bear the expenses of the suit. A client assigned a third of his claim to each of two attorneys, A and B, in consideration of their legal services; and one of the conditions of the agreement was that A should bear the expenses of the suit. In an action by A and B against the client for their proportionate parts of the judgment



## ATTORNEY AND CLIENT (Continued).

obtained, it was held that while an attorney may contract for a contingent fee, yet in this case the agreement of A to bear the expenses rendered his claim champertous, and further, since the undertakings of A and B were dependent, and could not be separated from each other, A's promise vitiated the whole contract, and neither A nor B could recover: *Geer et al. v. Frank et al.*, 53 N. E. (Ill.) 965.

## BILLS AND NOTES.

It seems remarkable that a case was carried to the Court of Appeals of New York, to have that court affirm a decision of the Supreme Court to the effect that an indorser of a note, when sued by a subsequent indorsee taking the note for value before maturity and without notice, cannot set up as a defence that the name of the maker was forged, and that he was unaware of the fact when he indorsed it: *Lennon v. Grauer*, 54 N. E. 11.

## CARRIERS.

There have been various decisions of courts as to the right of a railroad to give the exclusive right of carrying passengers and baggage to and from its station to a single transfer company, which alone might enter its grounds for that purpose. The Supreme Court of Indiana, in *Indianapolis Rwy. Co. v. Dolin*, 53 N. E. 937, has decided that such a regulation is beyond the power of the company and void. The court said that while a railroad has undoubted power to make regulations for the use of its grounds, yet the term "regulations" implies uniformity in operation, and not discrimination. Since the land was acquired under the power of eminent domain, it must be used for the benefit of the public, and the grant of a monopoly to a single transfer company was not such a public use as justified the holding of the land by the railroad.

## CONSTITUTIONAL LAW.

The Supreme Court of Massachusetts, in *In Re Brown*, 53 N. E. 998, has upheld the validity of a statute (St. 1898, c. 549), providing that in proceedings had in any police district or municipal court in which the judgment debtor resides, when proof is furnished that the debt is for necessities furnished, a decree may be made fixing the time and place of pay-

Statute  
Preferring  
the Claims of  
Certain  
Creditors

## CONSTITUTIONAL LAW (Continued).

ment, a non-compliance with which shall enable the court to summon the debtor for contempt.

The law was assailed, *inter alia*, as a violation of the fourteenth amendment, in that it denied the equal protection of the laws to all, since it applied only to persons within the jurisdiction of the above-mentioned courts. But the court sustained it on the ground that it was a municipal regulation, based simply on the necessities of administration in dealing with a population unequally distributed over the state; citing *Missouri v. Lewis*, 101 U. S. 22; *R. R. Tax Cases*, 115 U. S. 321, and *Hayes v. Missouri*, 120 U. S. 68.

The legislature of Arkansas passed a statute (Acts, 1889, p. 76), providing that when any person or corporation engaged in the railroad business should discharge with or without cause any servant or employe, the unpaid wages of such servant should become due and payable at the contract rate without reduction, and in case of failure to pay such wages, they should, as a penalty, continue at the same rate until paid. The statute was attacked as a violation of the fourteenth amendment in its application to railroad companies chartered prior to 1889. In *St. Louis, etc., R. Co. v. Paul*, 19 Sup. Ct. 419, its constitutionality was sustained by the Supreme Court of Arkansas (64 Ark. 83), and on appeal to the Supreme Court of the United States the decision was affirmed.

The opinion of the court, delivered by Chief Justice Fuller, is based largely on Art. 12, § 6, of the Constitution of Arkansas, providing for the alteration, amendment and repeal of the charters of corporations, and while it admits the soundness of the argument of the *Sinking Fund Cases*, 99 U. S. 700, that the power to amend cannot be used "to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually acquired, of contracts lawfully made," yet the present statute is said to be fair and reasonable as a regulation of the business of railways, and easily sustainable under the police power.

The case of *Rwy. Co. v. Ellis*, 165 U. S. 150, in which the Supreme Court declared void a statute of Arkansas which provided for a recovery of an attorney's fee of \$10 from railroad companies for failure to pay certain debts, was distinguished on the ground that it was an arbitrary regulation which imposed a special burden on railway companies for no

## CONSTITUTIONAL LAW (Continued).

cause whatever, and was not directed toward a reform of abuses specially applicable to railroads, but it was one which would be equally appropriate for all debtors.

An excellent contrast to the preceding case is that of *Lake Shore, etc., Rwy. Co. v. Smith*, 19 Sup. Ct. 565. Here the legislature of Michigan, which had previously passed a statute fixing the maximum railroad rate in Michigan, provided that the railroads in that state should issue 1000-mile tickets for a certain price.

Statute  
Requiring the  
Sale of 1000-  
Mile Railway  
Tickets

The Supreme Court of the United States defeated an attempt to justify this act on the reserved power of amendment and repeal of corporate charters, and held it to be a violation of the fourteenth amendment, Fuller, C. J., and Gray and McKenna, JJ., dissenting. As Justice Peckham, who delivered the opinion, said: It was a provision for a discrimination, "an exception in favor of those who desire and are able to purchase tickets at what might be called wholesale rates; a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule." The Supreme Court does not seem to favor an extension of the police power in favor of a particular class of persons, especially when the result of such a law would probably be to cause the rest of the community to bear a greater burden, for the railroads would probably, directly or indirectly, take from the general public whatever they would be forced to lose on a special sale of tickets at a specified price.

The Supreme Court of the United States has recently affirmed the constitutionality of a Kansas statute (Laws, 1885, p. 258, c. 155, §§ 1, 2), providing that when a suit is brought against a railroad company for damage by fire caused by negligence in the operation of its trains, the company is required to pay a reasonable attorney's fee to the successful plaintiff. The law, in the opinion of Brewer, J., is a reasonable police regulation and not violative of the fourteenth amendment: *Atchison Rwy. v. Matthews*, 19 Sup. Ct. 608.

Attorneys'  
Fees to be  
Paid by  
Railroads in  
Damage Suits

Harlan, J., with whom concurred Brown, Peckham and McKenna, JJ., delivered a vigorous dissenting opinion, in which he characterized the law as an unwarranted discrimination

## CONSTITUTIONAL LAW (Continued).

against railroads, imposing a penalty upon them from which all other suitors are free, and depriving them of the equal protection of the laws.

This case is only one of the many which show how evenly divided is the Supreme Court on questions of this kind; and it would seem that it will be some time yet before the scope of the fourteenth amendment, as affected by the states' police power, is clearly defined.

The Supreme Court of Massachusetts has upheld the constitutionality of an habitual criminal act providing that who-  
**Habitual Criminal Act** ever should have been twice convicted of crime and imprisoned for more than three years, should, on being convicted of another crime, be sentenced to an imprisonment of twenty-five years. The law was attacked: (1) as an *ex post facto* law in relation to cases where the first two crimes were committed before its passage; (2) as a "cruel and unusual punishment; (3) as a deprivation of liberty without due process of law. The court overruled all these objections, chiefly relying on *In Re Kemmler*, 136 U. S. 436, for the second one. It seems remarkable that the court was again obliged to reiterate the rule that the bill of rights contained in the first ten amendments to the Constitution of the United States has nothing whatever to do with action by the states: *McDonald v. Comm.*, 53 N. E. 874.

## DAMAGES.

In *Cleveland, Etc., Rwy. Co. v. Quillen*, 53 N. E. 1024, it appeared that plaintiff, who was a passenger on the defendant  
**Excessive Damages, Negligence of Railroad** railroad, was misinformed by the conductor of the train as to the station at which he should alight; in consequence of which he got off at a station twelve miles from his destination, to which he was forced to drive in a carriage on a cold night. In an action against the railroad, plaintiff obtained a verdict of \$150, the jury specifying that \$25 of this was for loss of time and \$5 for the hire of the carriage.

The Appellate Court of Indiana was of the opinion that the remaining \$120 was an excessive compensation to plaintiff for a three hours' drive and the postponement of his supper until eleven o'clock at night; accordingly a new trial was ordered.

## EMINENT DOMAIN.

The Supreme Court of Pennsylvania has again applied the rule that, under Art. XVI, § 8, of the Constitution of Pennsylvania, providing for the recovery of consequential damages when land is taken under the power of eminent domain, the damages are not restricted to compensation for injuries to abutting properties: *Chatham St.*, 43 Atl. 365. Therefore, when the grade of a street was changed under the Act of May 16, 1891, damages were allowed to be recovered by an owner of lots, which did not front on the street, but which drained into the street through connecting alleys, and whose drainage was rendered impossible by the change of grade, save at great expense. The cases of *Mellor v. Phila.*, 160 Pa. 614, *Melon St.*, 182 Pa. 397, and *Snyder v. Lancaster*, 20 W. N. C. 185, were cited on this point.

A, the owner of land, through which the B railroad company had constructed its road under the power of eminent domain, died without having instituted proceedings to recover damages. The question arose whether the right to recover damages vested in the personal representative or the heir. The Supreme Court of Indiana properly held that, since the road had been actually constructed during the life of the decedent, the claim against the railroad became a mere chose in action, which should be enforced by the personal representative: *I. & V. R. Co. v. Price*, 53 N. E. 1018. But it should be remembered that if the road had been merely located during the life of the decedent, and the actual construction not started until after his death, the injury would be done to the land, and the heir would have the right to recover damages therefor.

The sewerage commissioners of Massachusetts constructed a sewer through the land of the petitioner, by virtue of Stat. 1890, c. 270, which provided, *inter alia*, that the commonwealth "shall pay all damages that shall be sustained by any person or corporation by reason of any such taking." In a proceeding by the petitioner to recover damages, under the statute, for injury to the remainder of his land, caused by the drainage of his wells by the sewer, it was strongly contended on behalf of the commonwealth that the taking, for which it was liable, was limited to the acquisition of a title to the land

EMINENT DOMAIN (Continued).

or easement taken, and that for any other damage caused by the construction of the sewer to the remaining premises, the remedy of the petitioner, if he had any, was by an action at law.

The Supreme Court of Massachusetts held that the statute was broad enough to cover both damages caused by the direct taking, and the consequential damages arising therefrom; therefore, since the defendant would have been liable at common law for the diversion of the water from the petitioner's wells, this was a consequential injury within the terms of the statute, and recovery could be had in the proceedings thereunder. The case of *Bacon v. Boston*, 154 Mass. 100, which arose under a statute providing that the city should make compensation "for such lands as it shall take under this act," was distinguished on the ground that the latter statute intended to provide only for damages arising from the direct taking: *Penney v. Comm.*, 53 N. E. 865.

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EVIDENCE.

The case of *Debler v. State ex rel. Bierck*, 53 N. E. (Ind.) 850, decides several questions of evidence in relation to bastardy

**Bastardy Proceedings** proceedings: (1) That it is proper to introduce evidence of the fact that at or about the time of the alleged sexual intercourse of the relatrix and the defendant, the relatrix had intercourse with other men, but the effect of such evidence is only to impeach the testimony of the relatrix; (2) Evidence is admissible to show that at the time of such intercourse the defendant was infected with a venereal disease and that the relatrix was not; (3) A statement of the relatrix that a certain man, other than the defendant, was not her "beau" any more, is inadmissible.

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HUSBAND AND WIFE.

The common law in relation to the powers of married women prevails in Massachusetts to a surprising extent. In *Bank v. Whicher*, 53 N. E. 1004, the defendant, a married woman, made a promissory note payable to her husband, by whom it was indorsed to the plaintiff. In an action on the note, it was held that the Massachusetts statutes in relation to married women

Note Made by  
Married  
Woman,  
Validity

**HUSBAND AND WIFE (Continued).**

had not given the defendant power to make the note, and it was therefore void; nor was the case changed by the fact that the note was delivered by the husband to the plaintiff in payment of a debt of the married woman to the plaintiff.

**INSURANCE.**

In *Barnes v. Fidelity Mut. Ins. Co.*, 43 Atl. 341, which was an action on a policy of life insurance, the question arose over the effect of the following representation in the application: "That I am in good health, and free from any and all diseases, sickness, ailments or complaints, trivial or otherwise."

**Construction  
of Words,  
"Good  
Health"**

At the time of the delivery of the policy and the payment of the first premium the insured was suffering from a severe cold, and he died of pneumonia six days afterwards. The trial judge left it to the jury to determine whether the condition of the insured was such as to bring him within the terms of the above representation. From a verdict in favor of the insured, the defendant appealed, and judgment was affirmed by the Supreme Court of Pennsylvania, Sterrett, C. J., saying: "As stated by a learned text writer, the term, 'good health,' does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which the flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms, the requirement of 'good health' is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of sickness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health." Citing 3 Joyce, Insurance, § 2004.

The Supreme Court of Pennsylvania has reiterated its decision in *Comm. v. Vrooman*, 164 Pa. 306, to the effect that a foreign insurance company, which has not complied with the provisions of the Act of April 4, 1873 (P. L. 20), authorizing insurance companies to transact business in Pennsylvania on the performance of certain conditions, cannot insure

**Foreign  
Insurance  
Companies,  
Business in  
Pennsylvania**



INSURANCE (Continued).

property until the conditions have been complied with. Accordingly it was held (Mitchell, J., dissenting), that an Ohio insurance company, which had issued a policy to the owner of property in Pennsylvania before the certificate authorizing it to do business was issued, could not recover on premium notes made by the insured : *Swing v. Munson*, 43 Atl. 343.

MUNICIPAL CORPORATIONS.

The Supreme Court of Massachusetts has declared unconstitutional a statute directing the assessment of sewerage charges on property, on the ground that it forces the property owners to bear the whole cost of an improvement which is not a special benefit to them, but a general one to the municipality : *Sears v. Street Com'rs of Boston*, 53 N. E. 876.

The court cites and relies upon *Hammett v. Phila.*, 65 Pa. 146, *Washington Ave.*, 69 Pa. 352, *Williamsport's Appeal*, 41 Atl. (Pa.) 476, and *Erie v. Russell*, 148 Pa. 384, in which last case the Supreme Court of Pennsylvania said, "It [the sewer] was made by the action of the city as a part of its system of sewerage, which is as necessary for the health of its people as its paved streets are for their use . . . It is now a constituent of the general system ordained by the city for the convenience and health of its inhabitants. The system confers benefits which are general. It is a public necessity, and the expense of maintaining it should be provided for by general taxation."

NEGLIGENCE.

It is now becoming common for a property owner, whose property is situated at the corner of two intersecting streets, and whose house does not extend to the line of either street, to keep a grass plot extending around the house on each side, and, in order to prevent passers-by from making a short cut across the grass plot, to stretch a wire fence diagonally from the corner of the house to the corner of the two streets, leaving the outer edges of the grass plot without any fence or other obstruction.

In *Quigley v. Clough*, 53 N. E. 884, the defendant had constructed a diagonal fence of barbed wire, against which the plaintiff walked, on a dark night, and was injured. The Supreme Court of Massachusetts held that there could be no

# NEGLIGENCE (Continued).

recovery, on the ground that the plaintiff was a trespasser, and the defendant was not guilty of actual malice.

While the decision is doubtless correct, it is certainly unfortunate, since the practice of putting a barbed wire fence in such a position is highly objectionable. On a dark night it is hardly possible for a pedestrian to tell when he has overstepped an imaginary line, the consequence of which is to make him a technical trespasser, and the position in which the fence is placed, virtually makes it amount to a man-trap under such circumstances. The subject is one which should be brought before the consideration of the municipal authorities.

The Court of Appeals of New York has decided (Martin, Bartlett and Vaun, JJ., dissenting) that it is not negligence in a municipality to fail to remove the snow from sidewalks: *Lichtenstein v. Mayor, etc., of New York*, 54 N. E. 69. It appeared that prior to the accident in question, there had been heavy falls of snow, which the city had shoveled to each side of the sidewalks, forming large "banks," the sides of which had frozen over and become slippery. On the day of the accident, the warmth of the weather had caused a pool of water to form on the sidewalk, to avoid which plaintiff stepped on one of the banks and slipped, suffering an injury. Judgment for plaintiff was reversed on the ground that the formation of the "banks" and the accumulation of the water was only that which was to be expected under the circumstances, and that a decision against the city in such a case would practically amount to laying down the rule that the city was an insurer for the safe condition of its sidewalks.

In *Betts v. Lehigh Val. R. Co.*, 42 Atl. 362, the Supreme Court of Pennsylvania has applied one of the exceptions to the "stop, look and listen" rule, so strictly enforced in that state. It is that when a person comes to a railroad station to board a train, to approach which he is forced to cross an intervening track, he has a right to rely on a rule of the company that no train shall run on that intervening track while another train is receiving or discharging passengers at the station; therefore in such a case it is not contributory negligence *per se* for him to cross that track in violation of the "stop, look and listen" rule. In support of the exception the court cited *R. R. v.*

Duty of  
Municipality  
to Free Its  
Sidewalks  
from Snow

"Stop, Look  
and Listen,"  
Exception

NEGLIGENCE (Continued).

*White*, 88 Pa. 327; *Kohler v. R. R.*, 135 Pa. 346; *Flanagan v. R. R.*, 181 Pa. 242; *Morgan v. R. R.*, 16 Atl. 353; *Warner v. R. R.*, 168 U. S. 339.

PARENT AND CHILD.

The Appellate Court of Indiana has affirmed the doctrine that statutes giving a right of action for the death of human beings must be strictly construed in regard to the parties entitled thereunder. In *Citizens' Rwy. Co. v. Cooper*, 53 N. E. 1093, it appeared that a bastard child, for whose death the action was brought, had been reared and supported by the plaintiff since his birth, but was never legally adopted. In an action brought against a railroad to recover damages for his death, the court denied a recovery, on the ground that plaintiff was not a "parent" within the statute, likening her case to that of the mother of a bastard, or that of a man who marries a bastard's mother, neither of whom could sustain the action.

PLEADING AND PRACTICE.

While only a dictum, the statement of Judge Morrison in *Oxley v. Oxley*, 43 Atl. 340, affirmed, *per curiam*, by the Supreme Court of Pennsylvania, will be of interest to attorneys in divorce cases: "We desire to call attention to the fact that the respondent did not file any answer, and yet he appeared before the examiner with his counsel, cross-examined the libellant's witnesses, and testified on his own behalf. This is not good practice. Under the law and rules of this court, if he desired to offer testimony he should have filed an answer raising an issue; and this is so, whether he desired an issue to be tried by the court or by a jury."

PROPERTY.

One P, who was an officer in the service of the United States, advanced to his successor, out of his own funds, a large sum of money for the use of the government. The money was so used, and by Act of Congress, February 23, 1891 (26 Stat. 1371), it was provided that the money should be repaid to "P and his heirs." Before the money was paid

**PROPERTY (Continued).**

P died, and the payment of the money to P's heirs was disputed by his creditors.

The Supreme Court of the United States held that the proper construction of the statute showed that Congress did not intend to confer a mere gratuity on P, but it was a recognition of a moral and equitable, if not legal obligation to restore him the money; that the word "heirs" in this connection was equivalent to the words "personal representatives," and the money, being merely personal property, like any other claim, was payable to P's creditors, to the exclusion of his heirs: *Price v. Forrest*, 19 Sup. Ct. 434.

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CUSTOM IN RELATION TO CONTRACTS; PAYMENT OF MONEY UNDER MISTAKE OF LAW, RELIEVED IN EQUITY. The very recent case of *Gas Co. v. Gaines*, 49 S. W. 462, decided February 9, 1899, in the Court of Appeals of Kentucky, is the culmination of a series of decisions in that state concerning the right of one paying under mistake of law to recover in equity. The facts were as follows: Appellant company succeeded to the control of the gas plant in the city of Frankfort. In the contract giving them control was the following clause, "And the second party or its assigns are, and hereby agree and bind themselves to supply consumers of gas at the rate of not exceeding \$2.00 per 1000 cubic feet . . . to supply the said city and the private consumers with a good quality, and

keep the said works in constant operation, reasonable time for repairs, and unavoidable accidents excepted." The company charged Gaines 25 cents per month meter rent, claiming a right to do so, as the city, which was previously in charge, had made a similar exaction. The court held that no meter rent could be charged, as it could in nowise be inferred from the contract that the company was meant to have this right: Following *Gas Co. v. Dulaney*, 38 S. W. 703. The further question then arose, should the company repay to Gaines the meter rent which he had paid them for five years under mistake as to his legal obligation? Held, that the company was bound to repay.

The earliest Kentucky case dealing with a question of this kind—and which, significantly enough, is not cited in the case under discussion—is *Underwood v. Brockman*, 4 Dana, 310, decided in 1836. The bill in this case was brought to set aside a written instrument made by a very old man. In concluding the opinion it was said, "Whether, therefore, the compromise is evidence of fraud, *or* surprise *or* imbecility, *or* whether there was an evident mistake of plain law, and was, therefore, nothing fit for a compromise, is not material; for it seems clear to us, that *some one or all* of these several hypotheses should be admitted to be true; and *if any one* of them be so, the decree for a re-conveyance of the land was not unjust or erroneous." Notwithstanding this ambiguous decision the next case on the point—*Ray v. Bank*, 3 Ben. Mon. 510 (1843)—and one on which the court relied on in *Gas Co. v. Gaines*, assumes it as authority for the principle enunciated in the latter case. Later cases affirming the view are *Covington v. Powell*, 2 Metc. (Ky.) 228 (1859); *Louisville v. Henning*, 1 Bush, 381 (1866); *McMurtry v. R. R. Co.*, 84 Ky. 462, 1 S. W. 815 (1886); *L. & N. R. R. v. Hopkins*, 87 Ky. 613 (1888); *Gas Co. v. Dulaney*, 38 S. W. 703 (1897). It is true that in one portion of the opinion in *Underwood v. Brockman*, 4 Dana, 318, it is said, "But when it can be made *perfectly evident*, that the *only* consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no *fair compromise of bona fide* and *doubtful* claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." But this, taken in connection with the *ratio decidendi* quoted above, is a very flimsy foundation for such an important doctrine, and should be viewed as a mere dictum.

Perhaps no maxim of the law is more familiar or of more general application than, "*Ignorantia legis non excusat*:" *Manser's Case*, 2 Coke, 3 b. This is a doctrine of the civil law as well and further has the practically unanimous weight of modern authority to sustain it: See Bispham, Equity, § 187, *et seq.* In the leading case of *Bilbie v. Lumley*, 2 East, 469 (1802), Ellenborough, L.C.J., said, "Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."

It applies to special as well as general rules of law, to civil as well as criminal law: Pomeroy, Equity, § 841, *et seq.* "It is settled at law and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, *but with full knowledge of all the circumstances*, cannot be recovered back:" *Ib.* and authorities there cited. "Generally money paid under mistake of law cannot be recovered, although it is against conscience for the defendant to retain it:" Keener, Quasi Contracts, p. 85 and authorities there cited.

The decision of the court in *Gas Co. v. Gaines* is not only contrary to the overwhelming majority of cases, but the line of cases which it follows is founded upon a mere dictum. The court seems to have deliberately made a rule which it has followed ever since.

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PROPERTY RIGHTS OF AN AUTHOR IN HIS OWN MANUSCRIPT. *New Jersey State Dental Society v. Denticura Co.* (Court of Chancery of New Jersey, 1898), 41 Atl. 672. At an annual meeting of the New Jersey State Dental Society, a committee of the society read a report in the nature of an original essay on the care and preservation of the teeth, several passages of which commended the tooth paste "Denticura" manufactured by the defendant. The society accepted the report and put it on file for discussion later. After the meeting the defendant secretly procured a copy of the report and proceeded to use the commendatory passages as an advertisement of his tooth paste "Denticura." Thereupon the society filed a bill praying that the defendant be restrained from publishing the above mentioned extracts. It appeared that many members of the outside public—not members of the society—were present at the meeting. On these facts the Vice-Chancellor granted the injunction, holding that the defendant had failed to prove a dedication of the report to the public by the society, and that the entire property in the report remained, therefore, in the society.

What constitutes such a publication by an author of his work as conveys a title in that work to the public and thereby deprives the author of the exclusive right to the use of the work, is a question of some interest.

It is clear that the publication *in print* of a work of which no copyright has been obtained, is a complete dedication to the public for all purposes. But in the case of unprinted works published before a number of people—a play produced on the stage, a lecture read by a University professor to his students, a sermon delivered from the pulpit—the question, what in such cases amounts to a complete dedication, is never difficult.

The general test to be applied in such cases appears to be that laid down by Lord Chancellor Halsbury in *Caird v. Sime*, 12 App. Cas. 326 (1887). There the question was whether, in the case of lectures orally delivered in the University of Glasgow to students of the University, there was a dedication to the public. The court said it must be decided "by the nature of the thing, from the



circumstances of its delivery and the object with which it was delivered." They held that these lectures, having been delivered to a very limited number of persons, for the sole purpose of instructing those present, had not been dedicated to the public. Lord Fitzgerald dissented on the ground that a professor in a publicly endowed University of Scotland "spoke for the University," and that his obligation was "to teach the nation through its youth." The majority declined to accept this view of the status of a University professor, but admitted that if it was correct, then there had been a dedication to the public, even though the class room was open only to those who paid the required fee and complied with the other requirements. This point is interesting as showing that the House of Lords did not regard the payment of a fee by the student as conclusive against the idea of publication. They based their judgment on the nature of the position of a University professor. There seems to be a tendency in some recent cases to regard the payment or non-payment of an admission fee as the sole test as to the dedication of a literary production to the public. This, it is submitted, is incorrect both on principle and authority.

Whether a student has the right to take a stenographic report of a professor's lecture and then sell copies of it to the other students of the class, a practice common in many law schools in this country, is apparently undecided. The student certainly has no right to sell such copies to members of the outside public, and under the test laid down in *Caird v. Sime* it is, at least, arguable whether he may even sell them to other students, especially if it is done in the face of a declaration by the Faculty of the institution that such a sale of reports of lectures to students is opposed to the objects for which the lectures are delivered.

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CRIMINAL LAW ; NUISANCE ; POLLUTION OF A STREAM SUPPLYING PUBLIC WATERWORKS. The case of *Commonwealth v. Yost*, 10 Pa. Super. Ct., decided July, 1899, is interesting, not only because it concerns the pollution of a public water supply—a question which has recently attracted much attention—but also because it throws additional light upon the line of distinction which marks off the case of *The Coal Company v. Sanderson*, 113 Pa. 126, from the other cases involving the question of riparian rights.

In *Commonwealth v. Yost*, the Superior Court reverses the opinion of the Quarter Sessions Court and orders a re-trial of the case. The defendant was indicted for maintaining a nuisance in that he allowed the sewage to flow from his premises into one of the tributaries of a creek from which water is supplied to the City of York at a point twelve miles below. The Commonwealth proved that disease germs could be carried that distance, and that there was serious danger of a contamination of the water supply of York. Defenses were made alleging, in the first place, that the Local Board of Health had declared the stream in question a public sewer, and that the defendant was, therefore, forced to drain into

it ; and, secondly, that the defendant had a prescriptive right to pollute the stream. The court below submitted to the jury the question of whether or not, as a matter of fact, this stream was a public sewer. The evidence tending to show that it was consisted in the proof that houses had been erected on the stream, that a highway bridge had been built across it and that, on one occasion, the borough street commissioner had removed some flood debris. In the Superior Court, Orlady, J., after referring to the fact that a watercourse does not lose any of its characteristics merely because houses are built on it, said : "There cannot be a public or common sewer that has not been constructed and maintained by a municipality, and that is not subject to municipal control." The rule here laid down is important because it renders futile the defense attempted in all such cases that because pollution has occurred in a stream within a municipality, the watercourse forthwith becomes a public sewer, and those having riparian rights below have no remedy against such pollution.

The evidence relating to the second defense showed that the borough had grown up from a few houses which were adjacent to the stream. But the Judge says : "No prescription or usage can justify the pollution of a stream by the discharge of sewage in such a manner as to be injurious to the public health. Lapse of time will not legalize a public nuisance. To deposit in a natural watercourse in close proximity to a source of supply from which the water is used for domestic purposes, the noisome and offensive matter described in the uncontradicted evidence in this case is a public nuisance, and it should have been so declared by the court." This is a restatement, but in stronger terms, of the rule laid down in *McCallum v. The Water Company*, 54 Pa. 40, decided in 1867. The Water Company was granted a perpetual injunction restraining McCallum from polluting their water supply. For a number of years McCallum had allowed the waste from his carpet mills to drain into the stream, but the impurities had been of a sort which could be easily removed at the waterworks. But in 1861 the manufacturing of blankets, which he then undertook, produced waste products which rendered the water in the stream totally unfit for use. McCallum set up a prescriptive right to pollute the water. Read, J., in affirming the judgment of the lower court, said : "Such a prescription to render running water unfit for drinking and domestic purposes by a riparian proprietor below you, requires the strictest proof of its existence." "If, therefore, an upper riparian proprietor claims the right to pollute the stream by prescription . . . he cannot pollute the water to any greater extent" than he did at the commencement of the prescriptive period. Here it will be noticed, it is not denied, as it is in the principal case, that a prescriptive right to pollute a stream may exist.

In an English case decided about the same time, *Goldsmid v. The Commissioners*, 12 Jurist N. S. 308, the Court of Appeal con-

sidered the question of a prescriptive right to pollute, though the case was decided on other grounds. But on this point, Sir G. J. Turner, L. J., says: "I assume, but without meaning to give any opinion upon the point, that such a right might well be acquired; but I think it could be acquired only by a continuance of the discharge of the sewage prejudicially affecting the estate, at least to some extent, for the period of twenty years."

It is difficult to see any clear line of differentiation between the facts in this case of *Comm. v. Yost* and those in *The Coal Company v. Sanderson*, 113 Pa. 126. Dr. Yost's actions would be covered by this proposition laid down in the latter case as fully as were those of the Pennsylvania Coal Company. Clark, J., there said that "every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria* . . ." But the only real difference between these cases is to be found in the fact that in the Coal Company's case the court deemed it necessary to lay down a special rule where an adverse decision would have ruined one of the chief industries of the state; while in the present case there was no such public necessity. The court could, therefore, follow more closely the well established principles of the Common Law.

At some future time a case will doubtless arise where the pollution is caused by some large iron or textile manufacturing establishment, whose existence depends on its ability to drain its waste products into a stream which further on in its course contributes to the water supply of some city. It will be of great interest to notice how the courts in such a case will reconcile the doctrines laid down in *The Coal Company v. Sanderson*, *McCallum v. The Water Company*, and *Commonwealth v. Yost*.

## BOOK REVIEWS.

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**MR. SERJEANT STEPHEN'S NEW COMMENTARIES ON THE LAWS OF ENGLAND (PARTLY FOUNDED ON BLACKSTONE).** By His Honour JUDGE STEPHEN. The Twelfth Edition, thoroughly Revised and Modernized, and Brought Down to the Present Time. In Four Volumes. London: Butterworth & Co., 7 Fleet Street. 1895.

This twelfth edition of Stephen's well-known commentaries furnishes an excellent compendium of existing English law. Blackstone's clear and forcible language has been retained in every instance in which it does not constitute an anachronism, and is incorporated in a running narrative with Stephen's text and that of the last editor. Light brackets are used to indicate the parts taken bodily from Blackstone, and to facilitate the identification of Blackstone's words, these brackets are repeated at the top of every page which continues an extract.

The plan, as will be remembered, is a slight modification of Blackstone's. Its synopsis runs as follows:

- I. Of Personal Rights.
- II. Of Rights of Property.
  1. As to things real.
  2. As to things personal.
- III. Of Rights in Private Relations.
  1. Between master and servant.
  2. Between husband and wife.
  3. Between parent and child.
  4. Between guardian and ward.
- IV. Of Public Rights.
  1. As to the civil government.
  2. As to the church.
  3. As to the social economy of the realm.
- V. Of Civil Injuries.

Including the modes of redress.
- VI. Of Crimes.

Including the modes of prosecution.

The four volumes of this work are printed and bound in the clear and beautiful style almost universal in the English law books which, in these days, find their way to America. Mechanical aids to usefulness are found in abundance. Each of the first three volumes has a separate index, and the fourth contains a general index of the whole work. This feature is particularly grateful to those who have worked with the standard four volume editions of Blackstone. It seems strange that Blackstone's numerous editors have so persistently failed in providing appliances of this kind.

The work of the editor of this edition, Mr. A. Brown, seems

worthy of that of his honored predecessor. The latest legal developments have been faithfully recorded, and the commentaries as a whole we can commend unreservedly to the student of the law of England.

*R. W. W.*

A DIGEST OF THE LAW OF AGENCY. By WILLIAM BOWSTEAD. Second Edition. London: Sweet & Maxwell, L't'd. 1898.

The second edition of this book is fuller and better than the first. Such a book fills a place which an ordinary text book cannot fill. It cannot fail to save a practitioner much time in wading through the cases in an ordinary digest where the necessary haste of compilation too often results in misplacing a case, and where one has to sift through a great deal of worthless material in order to find the good. The objection that the principles contained in the articles, into which the book has been divided, seem too broad, is overcome by the ability with which the principles have been defined by the illustrations of digested cases. These illustrations have the real merit of being short, yet full enough to be complete. As a student's book, it can only be useful by reading in the reports themselves the cases bearing on the various principles given. Concise rules will not be so often retained by the reader as rules and the reasons for them. Only English cases are given.

It is quite equal in print and arrangement to the latest books published.

*H. H. B.*

DENIS ON CONTRACTS OF PLEDGE. A Treatise on the Law of the Contract of Pledge as governed by both the Common Law and the Civil Law. By HENRY DENIS, of the New Orleans Bar. 8 vo., pp. 619. New Orleans: F. F. Hansel & Bro., L't'd. 1898.

In a recent address before the New Orleans Bar Association,\* Mr. Henry Denis, speaking of the analogies and differences of the civil and common law, dwelt with particular emphasis upon the subject of the contract of pledge. He called attention to the importance of the pledge as the pivot of modern commerce, and deprecated the unsatisfactory condition of the law of pledge at the common law.

In an effort to clear up some of the confusion attending the common law learning on this subject, Mr. Denis, in the treatise which lies before us, has made a very careful comparison of the civil and common law doctrines relating thereto. He has discovered that the obscurity commented upon arises in great measure from the common law principles concerning chattel mortgages and

\* American Law Review, Vol. XXXIII, p. 28.

equitable liens and the absence of these securities from the civil law, renders the latter perfectly clear. We believe the study of comparative jurisprudence thus presented cannot fail to be of value to the student of the common law.

Among the subjects treated by the author are the nature and subject matter of the pledge, its forms and essentials, the nature of the pledgee's possession, his rights and obligations; sub-pledge; pledges of bills of lading, warehouse receipts, corporate stock, insurance policies, etc.; pledges by factors; equitable liens, etc. Under each topic the distinctions and similarities of the two systems of jurisprudence are carefully pointed out and explained. The book is supplemented by a collection of forms, and a good index.

*C. H. H.*

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**THE LAW AND PRACTICE RELATING TO WORKMAN'S COMPENSATION AND EMPLOYER'S LIABILITY, WITH SUPPLEMENT.** By W. ELLIS HILL, M. A. London: Waterlow & Sons, Limited. 1898.

The author first gives a brief account of the liability of the employer at common law in a very pleasing and attractive manner, the text being supplied with some of the leading cases on the subject. He next takes up the Employer's Liability Act, 1880, and shows the reason for its passage, and discusses the various provisions of the Act. The book contains the material sections of the Factory and Workshop Acts, 1878 to 1895, and Lord Campbell's Act. The chapter on the Workman's Compensation Act, 1897, is arranged in a systematic and logical way to show the provisions of that Act. In Appendix A the Employers' Liability Act, 1880, is discussed by sections, and all the cases which he considers of any value as containing decisions on points of law arising under that Act, of persons whose occupation is well defined, are commented upon. Appendix C contains a list of forms to be used under the various Acts. The arrangement of the book is good. The type is clear, plain and distinct. The book is marked by the absence of foot notes in small type, which is certainly a good feature. It will be of much use to the English practitioner and student.

*J. E. S.*

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**THE LAW OF PARTNERSHIP.** By FRANCIS M. BURDICK. Boston: Little, Brown & Co. 1899.

Mr. Burdick's volume is a valuable addition to the numerous collection of works on the important subject of partnership law. The arrangement of the book is the same as that followed by the author in his "Selected Cases on the Law of Partnership," published last year. The language is remarkably clear and forcible, and free from legal verbiage. At the head of each chapter the author gives

a resumé of what has been said on the subject about to be treated of, in former chapters. No new theories or original opinions are advanced by Mr. Burdick, his object apparently being to state the law of partnership, in its manifold aspects, as he has found it in statute books and judicial decisions. The chapter entitled "Partnership as to Third Persons," an unfortunate misnomer, is a systematic and logical exposition of the evolution of the present theory of what constitutes a partnership from the celebrated case of *Grace v. Smith*. The appendix containing the Partnership Statute Law of New York will be of invaluable assistance to practitioners in that state. Mr. Burdick's book is a concise, yet comprehensive treatise of partnership law, and will be read with profit by student and lawyer.

S. M. I.



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## SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

PART II.

*B. The decision was based on the theory that the state courts' reversal of interpretation of the statute was a law impairing the obligation of contracts.*

The purpose of the preceding section will become more evident as we proceed. We have attempted to show, and it is believed that it has been shown, that in cases involving statutory construction, the federal courts have acknowledged their duty to adopt the judgment of the state court as final.

It has often been said, however, that *Gelpcke v. Dubuque* and kindred cases form an exception to that rule. On principle it is clear that *Gelpcke v. Dubuque* must be justified, if at all, on one of three grounds :

(1) On the theory that the federal courts are not bound to follow state constructions.

(2) On the theory that the rule, as above laid down, exists, but that there is an exception, for some occult reason, in the case of contracts.

(3) On the theory that a federal question was involved. If the decision can be explained, without adopting one of these views, we are unable to comprehend that explanation.

The foregoing section has proven that the first view is untenable, even if it had ever been urged. We believe that the same principle, as there investigated, renders impossible the second view. It is not necessary here to further elaborate on the principle as discussed in the latter part of the preceding section. As there stated, the federal courts, either have, or have not, the right to construe state statutes. If they have not, and we have shown that they have not, then, where the power does not exist, no "exceptions" can arise. This on principle seems plain. But, it is said, the federal courts have made an exception. This, however, begs the question. In the first place, it is not a legitimate argument for the correctness of a principle discussed on *a priori* grounds, to cite a decision; and, in the second place, it is yet to be demonstrated that these cases were decided on that principle.

All text writers who advance the "exception" theory, declare, at the same time, that the theory is unsound. This brings us to the conclusion towards which all the argument so far has been directed. *Either Gelpcke v. Dubuque is a wrong decision, or else it involves a federal question.* Having on principle reached this conclusion, we proceed to find out what was, in fact, the basis of the decision.

Ever since the case was decided, text writers have been advancing theories upon which, in their opinions, the case was rested. Professor Thayer, in an article in the *Harvard Law Review*<sup>1</sup> upholds the decision, but places it upon the ground of *bias*. That is, he says, where the federal courts have reason to believe that the state courts have been partial in administering the state law, they can, themselves, entirely disregard the state law. This seems to be a remarkable conclusion. As Professor Thayer, himself, says, one reason for establishing the Circuit Courts, was to provide an impartial tribunal wherein the *law of the state* should be administered;

<sup>1</sup> 4 Harv. Law Rev., 311 (1891).

and yet in order to administer impartially that *law of the state*, the federal courts may entirely disregard it, and administer some other law, for it must be conceded that the decisions of the state court are what, within the thirty-fourth section of the Judiciary Act, do constitute the law of the state. From the standpoint of at least one of the parties, who has a legal right to have the law of the state applied to his case, this would scarcely seem to be a notable instance of impartiality. To allow such a latitude as this, in the case of "bias," would be to give the federal courts an unlimited right to disregard state laws whenever they see fit to do so. With the greatest respect for the eminent writer, it is submitted that the decision cannot be supported upon this theory, and there is no ground for believing it to have been the basis of the court's opinion.

Hon. Henry Reed, in his article entitled "The Rule in *Gelpcke v. Dubuque*,"<sup>1</sup> makes an exhaustive examination of the cases, and ends by declaring *Gelpcke v. Dubuque* to be an anomalous case, which is unknown elsewhere in the law. He does not seek the principle upon which it was founded, but contents himself by saying that the decision was just, has not been overruled, and was made necessary by peculiar circumstances. This may be a satisfactory conclusion to the utilitarian, but is certainly most disappointing to a student of law. The fact that the decision is just, should lend additional diligence to the search for its underlying principle, but of itself is not a sufficient answer to legal objections to its soundness.

Professor Pepper, in his book above referred to, seems to think the decision recognizes an exception to the duty of the federal courts to "follow," and therefore questions its soundness.

Mr. William B. Hornblower<sup>2</sup> and Mr. Conrad Reno,<sup>3</sup> in two well considered articles, support the case on the theory that it involves a federal question.

<sup>1</sup> 9 Am. Law Rev., 381 (1871).

<sup>2</sup> 14 Am. Law Rev. 211.

<sup>3</sup> 23 Am. Law Rev. 190.

Mr. William H. Rand, Jr.,<sup>1</sup> places the decision upon the same ground, but intimates his opinion that it cannot be supported.

Professor Patterson says that under the word "law," as used in the federal clause forbidding states to impair the obligation of contracts, is included "judicial decisions of state courts of last resort, rendered subsequently to the making of the contract in question, and antecedently to the suit in which the court determines the invalidity of the contract, and altering by construction the constitution and statutes of the state in force when the contract was made,"<sup>2</sup> citing *Gelpcke v. Dubuque*.

Mr. Cooley also places the decision on the ground that the federal clause was violated.<sup>3</sup>

The case is referred to without comment in a note to Story on the Constitution.<sup>4</sup> No reason is given for the conclusion reached therein.

Hon. J. I. Clark Hare, however, gives a careful discussion of the entire series of cases represented by *Gelpcke v. Dubuque*, and clearly intimates his opinion that the case was decided on the theory that the state courts' decision was a "law" within the meaning of the federal clause.<sup>5</sup>

Enough has been said to show that text writers generally, certainly all whose works are recognized as standard authorities, concur in the opinion that the decision in *Gelpcke v. Dubuque* was founded on the theory that a federal question was involved. But however much we may prize the opinions of writers, after all the best source of knowledge is the case itself, and the comments upon it in later opinions of the same court.

Mr. Justice Swayne delivered the opinion. His language has been the subject of much adverse comment. It must be conceded that the learned justice leaves much to be desired. However, if his opinion be examined with a view to discover-

<sup>1</sup> 8 Harv. Law Rev. 328.

<sup>2</sup> Federal Restraints on State Action, pp. 146-147.

<sup>3</sup> Cooley's Principles of Const. Law, p. 312.

<sup>4</sup> Vol II, pp. 575-576.

<sup>5</sup> Hare's American Const. Law, pp. 721-726.

ing the underlying principle which was in the mind of the court, it is thought that the examination will not prove so unsatisfactory as at first appears. In the first place, we must assume that the rule that the federal courts are bound to follow the state courts' construction of their own laws, was present in the mind of Mr. Justice Swayne. The strongest proof of this is the language of Mr. Justice Miller, dissenting. He says, "The general principle is not controverted by the majority, that to the highest courts of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the state court, that this court is bound to follow it." Further, he calls attention to the language of Mr. Justice Swayne in the case of *Leffingwell v. Warren*,<sup>1</sup> which was decided at the next preceding term of court. In that case Mr. Justice Swayne says, "The construction given to a state statute by the highest judicial tribunal of such state, is *regarded as a part of the statute, and is as binding upon the courts of the United States as the text.* . . . If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications." No language can be more clear or explicit than this. It is impossible to believe that Mr. Justice Swayne could have overlooked this principle in preparing his opinion. We assume that it was in his mind at the time. He must have grounded his decision upon a well defined exception to the rule, or upon the theory that the state court's decision violated a federal clause.

It may here be parenthetically remarked that Mr. Justice Miller's suggestion that the court were influenced in their decision, because they considered the state construction to be unsettled, will not bear examination. Mr. Justice Swayne, on page 205, says it is unnecessary to decide whether the construction was or was not settled, as the point was not

<sup>1</sup> 2 Black, 599.

material. It could not, therefore, have been the basis of the decision.

We return to the proposition just stated. The decision must have rested upon a federal question, or upon a well defined exception to the rule. Nowhere in the language of the court is there a suggestion of an exception to be engrafted upon the principle that the federal courts are bound to follow the construction of the state courts.

The first half of the opinion is devoted to a discussion of the legality of the state legislation. It has been suggested that the excitement and unrest, during the time of the Civil War, was largely responsible for the decision in this case. That it was a violent reaction from the doctrine of States' Rights which was at that time being pressed so disastrously by the states of the South. This may have been, to a great extent, true. This may have been the primary cause for the discussion of a clearly irrelevant question, in the early part of Mr. Justice Swayne's opinion. That it was irrelevant, and that Mr. Justice Swayne knew it was irrelevant, seems to be very clear. Perhaps he desired to administer a rebuke to the state for attempting to evade its obligations by a construction so palpably wrong as to be in conflict with the law of "sixteen other states," but that he intended to make that fact the ground of his decision, it is impossible to believe.

Mr. Justice Swayne, as we have pointed out, in a case just previous to *Gelpcke v. Dubuque*, clearly demonstrated his belief in the duty of the federal courts, as a matter of obligation, to follow the state courts in cases precisely similar to the one at bar. Is it conceivable that he had so soon forgotten the rule he there laid down, and now, as Professor Pepper says, "was assuming to administer not the law of Iowa, but the law of sixteen other states?" It cannot be denied that there is room for this criticism, because the opinion undoubtedly does remark upon the soundness of the former decisions, as contrasted with what is said to be the unsoundness of the latter. It is insisted, however, that this discussion was given merely for the purpose of exposing the intentions of the state, and not as a legal reason for the decision. A manifest error

in paragraphing tends to substantiate the criticism. In the report on p. 206, Mr. Justice Swayne closes his remarks concerning the erroneous character of the late Iowa decision. His closing sentence is placed at the beginning of the following paragraph, which deals with the question of the *effect* to be given to the state decisions by the Supreme Court. The last sentence in the preceding paragraph is, "Many of the cases in the other states are marked by the profoundest legal ability." This should be followed directly by the opening sentence in the following paragraph: "The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety." The court then begins an entirely different subject, and the one which involves the real principle of the case. It is not surprising that the second sentence in this paragraph should have been thought to be a sequence of the first, quoted above, but the subject matter of the two being entirely different, and there being no connecting words, it seems clearly to be an error of the transcriber. The next paragraph, as it should be arranged, and which in our opinion embodies the real ground of the decision whether right or wrong, reads as follows: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts, altering the construction of the law.* The same rule applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

Whatever may be said of the ambiguity of some portions of Mr. Justice Swayne's opinion, certainly such a criticism



cannot be applied to this paragraph. It is clear and emphatic. If the opinion had consisted of this alone, it would no doubt have received much less censure than it has.

*Gelpcke v. Dubuque* has been followed by a long line of cases in the Supreme Court. The principle uniformly adopted as the one there laid down, is that when a state court has altered the interpretation of a state statute, such decision amounts to an amendment of the statute, and is, within the meaning of the federal clause, a "law," which, when it impairs the obligation of contracts, must be deprived of its force by the federal courts.<sup>1</sup> This is so well known that we refrain from quoting from later cases. To recapitulate, the argument hitherto may be briefly summarized as follows :

(1) *The federal courts, when administering the law of the state, are as fully bound to accept the states' courts' construction of state statutes as they are to accept the statutes themselves.*

(2) *As there is no exception to the duty of the federal court to accept the state statutes, so there is no exception to the duty of the federal court to accept the states' courts' construction of those statutes, unless a federal question is involved. Both must stand or fall together, for the courts have declared them to be of equal rank.*

(3) *Mr. Justice Swayne was fully in accord with the rule as above given, as evidenced by his opinions both before and after Gelpcke v. Dubuque.*

(4) *Gelpcke v. Dubuque was decided on the ground that the Iowa decision altering the construction of the statute was, within*

<sup>1</sup> *Thompson v. Lee Co.*, 3 Wall. 327 (1865), Davis, J.; *Havemeyer v. Iowa Co.*, 3 Wall. 294 (1865), Swayne, J.; *Lee Co. v. Rogers*, 7 Wall. 181 (1868), Nelson, J.; *Butz v. Muscatine*, 8 Wall. 575 (1869), Swayne, J.; *The City v. Lamson*, 9 Wall. 477 (1869); *Olcott v. Supervisors*, 16 Wall. 678 (1872), Strong, J.; *Township of Pine Grove v. Talcott*, 19 Wall. 666 (1873), Swayne, J.; *Boyd v. Ala.*, 94 U. S. 645 (1876); *Town of S. Ottawa v. Perkins*, 94 U. S. 261 (1876); *Douglas v. Co. of Pike*, 101 U. S. 677 (1879), Waite, J.; *Anderson v. Santa Anna*, 116 U. S. 356 (1885), Harlan, J.; *County v. Douglas*, 105 U. S. 728 (1881), Waite, C. J.; *Green v. County of Conness*, 109 U. S. 104, Bradley, J.; *Louisiana v. Pilsbury*, 105 U. S. 278 (1881), Field, J.; *Ray v. Gas Co.*, 138 Pa. 391 (1890), Clark, J.; *Union Bank v. Board*, 90 Fed. 7 (1898); *Louisville T. Co. v. Cincinnati*, 76 Fed. 296 (1896); *Loeb v. Trustees of Ham. Co.*, 91 Fed. 37 (1899).

*the meaning of the federal clause, a "law," which impaired the obligation of contracts, and which the federal courts might refuse to apply for that reason.*

### SECTION III.—THE DISSENTING OPINION OF MR. JUSTICE MILLER.

Having reached the conclusion as to the basis of the decision in *Gelpcke v. Dubuque*, it remains to examine the correctness of that principle. Before taking up that phase of the subject, it may not be inappropriate to briefly refer, at this point, to some of the objections which have been raised to the decision. For the purposes of this paper, we may roughly divide all these objections into two classes :

(1.) Objections to the statement that a judicial decision may be a "law," when it construes a state statute.

(2.) Objections which have been raised to any other theory of the case, among which are the "exception" and "bias" theory.

If the argument heretofore is able to stand the test of investigation, we may disregard the second class of objections, because we have shown that the case was not decided on any of those principles. This paper would be incomplete, however, and its conclusions not well established, did we not give some space to a more careful examination of that which is the ground-work of nearly all later argument against the principle of this case, the famous dissenting opinion of Mr. Justice Miller.

Mr. Justice Miller's argument seems to assume that the court had recognized an exception to the rule that the federal courts must adopt the state courts' construction of their own laws. Most of his criticism, therefore, is levied at the "exception" theory. In all of that criticism we fully concur, because, as we have tried to show, there can be no exception to the rule. It must stand or fall in its entirety. That Mr. Justice Miller did not consider the case to be founded upon a constitutional question would appear from the nature of his criticism, but nevertheless, that he did recognize to some extent, at least, this view of the case, unmistakably appears from a careful perusal of his opinion, as we shall try to show later.

He points out that the majority of the court do not controvert the principle "that to the highest court of the state belongs the right to construe its statutes and its constitution, *except where they may conflict with the Constitution of the United States, or some treaty or statute made under it.*" After having made this clear statement, he proceeds to prove it by quoting from former opinions of the justices who composed the majority. Then, in the next breath, he declares that the majority do controvert the principle which he has just said they do not. It will be noted that the only exception which Mr. Justice Miller declares the majority recognize, is where the statute or constitution of the state violates the federal constitution. In the following paragraph he says: "But while admitting the general principle, the court say it is inapplicable because there have been conflicting decisions" in the state. This is the first reason which he conceives the majority gave. That this is an incorrect statement of the majority's conclusion appears by this language taken from Mr. Justice Swayne's opinion, page 205: "Whether the judgment in question can, under the circumstances, be deemed to come within that category ('the latest settled adjudications') it is not now necessary to determine."

In the same paragraph (p. 210) Mr. Justice Miller gives what he thinks was the second reason that induced the majority to decide as they did. He speaks of the "moral force" of the proposition, and continues, "And I think, taken in connection with some *fancied duty of this court to enforce contracts* over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be justified either on principle or authority." What that principle is, Mr. Justice Miller nowhere in his opinion states more definitely than here. But whatever he conceived it to be, it must have been an "exception," other than the only one which, he had just carefully proven, the majority entertained, if we concede that he did not recognize a federal question to be the basis of the decision.

That these vague reasons form a very unsatisfactory explanation of the court's decision must be apparent to every one. It seems little short of a contradiction for the eminent dissenting

justice to say that no exception save where a federal question was involved was recognized, and immediately to give as the basis of the decision of that court, a very indefinite reason for granting an exception other than that one.

He also seems inconsistent in another part of his opinion. On pages 208–209 he says, “ Yet this is in substance what the majority of the court have decided. They have said to the Federal Court sitting in Iowa, ‘ You shall disregard this decision of the highest court of the state on this question. Although you are sitting in the State of Iowa and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the Supreme Court of that state, but you shall decide directly to the contrary, and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. Where it says bonds are void, issued in the state, because they violate its constitution, you shall say that they are valid, because they do not violate its constitution.’ ” It is submitted that nothing can be further from what the court actually did say than the foregoing. According to this language; which is unlimited, the federal court claimed the right to construe the constitution and statutes of the state whenever it should choose to do so. The court distinctly disclaimed such a right, as Mr. Justice Miller, himself, had previously pointed out. What the court did do, and all that they did do, was to step in and protect the bonds held by the plaintiff. To do this it was not necessary to arrogate to themselves the right to dictate to the state what her laws should be ; all they said was, “ *you shall not in this case apply a statute or a construction of a statute which impairs the obligation of this contract.* ” The court distinctly say, “ However we may regard the late case in Iowa as affecting the future, etc., etc., ” thus plainly intimating their inability to interfere in any way with the rights of the state court.

That Mr. Justice Miller really recognized the truth of these observations, appears from a sentence from his opinion, on page 216: “ In the present case, the court rests on the former decision of the state court, *declining to examine the*

*constitutional question for itself.*" How does this sentence comport with the one quoted above, where he declared that the court by its decision had given the federal court sitting in Iowa the right to decide that bonds were valid "because the state statute was constitutional," that is because the federal court thought, contrary to the state court, that it was constitutional? It is one thing to claim a right to interpret a law for a sovereign state, and to force that law upon that state, a thing which, as Mr. Justice Miller points out, cannot be done; it is quite a different thing to say to the state court, "Construe your statutes as you will, and as is your undoubted right, but when you attempt to *apply* that construction, so that it impairs the obligation of contracts, we, by virtue of the federal constitution, claim the right to forbid you."

That Mr. Justice Miller really knew this to be the attitude of the court, is apparent from the fact that while mainly combatting what he thought to be the necessary principle of the decision, the "exception" theory, yet at the same time he advances at least two arguments against the "federal" theory.

On pages 210-11 he declares that there can be no question of the impairment of the obligation of contracts, because here the court is called upon "to determine whether there ever was a contract made in the case," not to enforce a contract whose existence was undisputed. This objection will not bear investigation. It assumes that the Iowa decision had a retroactive effect, which is the very point at issue.

The next objection which, without naming it, Mr. Justice Miller raises to the "federal" theory of *Gelpcke v. Dubuque*, is that a judicial decision cannot be a law; thus, on page 211, he says, "The decision of this court contravenes this principle (*i. e.*, that courts only interpret the law) and holds that the decision of the court makes the law, and in fact the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid." This last sentence is plainly inconsistent with the sentence of Mr. Justice Miller above quoted, where he declared in general terms that

the federal courts claimed the right to construe the Iowa statutes. Here he recognizes the scope of the decision to be limited to the protection of this contract, by virtue of the fact that it had been entered into before the decision of the Iowa court, which by applying a changed construction of the statute, impaired its obligation.

By the objection last referred to, Mr. Justice Miller has touched the principle upon which *Gelpcke v. Dubuque* must stand or fall. It is not proposed to discuss it here. His language is quoted to show that he, too, recognized the ground of the decision to be that, in the opinion of the court, a judicial decision can be a "law" within the meaning of the federal clause, when it enters into and becomes part of a statute. Mr. Justice Miller, however, persistently refused to recognize in terms that the court decided the case on this theory. The entire tenor of the court's opinion was distasteful to him, as he very plainly shows by his language, and as the thought that the federal courts could usurp state rights affected him most strongly, he dealt mainly with that view. Almost at the end of his opinion he says, "I think I have sustained by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes. *This invasion is made in a case where there is no pretense that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States.*" Side by side with this last sentence we will place, at the risk of repetition, a sentence from the opinion in which Mr. Justice Miller says there is no "pretense" that a federal clause had been encroached upon: "The sound and true rule is, that if the contract when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation, or decision of its courts altering the construction of the law. The same

principle applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

On the whole, Mr. Justice Miller's dissenting opinion leaves much to be desired. He does not plainly state what he considers to be the basis of the decision, but contents himself with a vigorous if not entirely connected dissent to the whole opinion. The chief source of dissatisfaction, however, lies in the fact that he attacks not the principle upon which the court actually based its opinion, so much as he attacks another principle which he thinks must have been the basis of the decision, but which, it is submitted, was not and could not have been.

If the contention as to what the underlying principle of the case is has been established, then Mr. Justice Miller's opinion is not pertinent except in so far as it deals with the question of judicial legislation.

#### SECTION IV.—EXAMINATION OF AUTHORITIES FOR THE PRINCIPLE INVOLVED.

In the discussion of the correctness or incorrectness of the principle, which we have shown to be the foundation of *Gelpcke v. Dubuque*, we propose to proceed first, by examining the authorities, and secondly, by an investigation on *a priori* grounds.

Before beginning an examination of the cases, let it be remembered that this paper deals not so much with the question of the soundness or unsoundness of *Gelpcke v. Dubuque* as viewed in the light of the decided cases of that day, as with the recent criticism of the position there assumed. We therefore claim the right to examine all cases bearing on the subject, even *Gelpcke v. Dubuque* itself and kindred cases, in order to throw light upon the attitude which the courts have taken.



In the first place, the courts have declared that

*A. The judicial construction of a state statute becomes a part of the statute, as much so as if incorporated into the text.*

This expression has been so often used by the courts that it scarcely needs to be supported by decisions. It has been assumed by some text writers and by some judges that the courts do not mean what they say by this statement. It is said that to give it a literal meaning, would be to give to a decision the force of a law. Feeling fearful of the consequences, should such a conclusion be established, the writers and judges were driven to the result just mentioned, *i. e.*, to say that when the courts have plainly said one thing, they mean something else. Whether the consequences of adopting the heretical doctrine that a judicial decision may be a law, would be so appalling as is feared by some eminent authorities, we shall not discuss at this point. The task now before us is to prove that the courts have laid down the rule as stated.

We have already proven that the federal courts are bound to follow the construction of the state courts in cases involving statute law. We have also shown that they receive the construction as a part of the statute. All that is necessary at this point is to refer again to the language used in some of those cases, with the idea of emphasizing the thought, that the construction does actually become a part of the statute law.

In *Elmendorf v. Taylor*,<sup>1</sup> Mr. Chief Justice Marshall says, "We receive the construction given by the courts of the nation (*i. e.*, the state courts) as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute." Here he plainly intimates his belief that the statutes and the construction are equally binding.

In *Green v. Neil's Lessee*,<sup>2</sup> Mr. Justice McLean said, in the course of his opinion, "If the construction of the highest judicial tribunal of the state *form a part of its statute law as*

<sup>1</sup> *Supra*, p. 479.

<sup>2</sup> *Supra*, p. 481.

*much as an enactment of the legislature, how can this court make a distinction between them?"*

In *Shelby v. Guy*,<sup>1</sup> Mr. Justice Johnson uses the following language: "Nor is it questionable, that a fixed and received construction of their respective statute laws in their own courts, *makes in fact a part of the statute law of the country*, however we may doubt the propriety of that construction."

In *Christy v. Pridgeon*,<sup>2</sup> Mr. Justice Field says, "If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretation, so far as it is a rule for our action, *a different law in one state from what it is in another*." That is, the action of the court changes the law since both acts are identical in language.

In *Leffingwell v. Warren*,<sup>3</sup> Mr. Justice Swayne says, "The construction given to a statute of a state by the highest judicial tribunal of such state, *is regarded as a part of such statute*, and is as binding upon the courts of the United States as the text."

In *Walker v. State Harbor Commissioners*,<sup>4</sup> the court say, referring to a state court's construction: "Whatever may be our opinion as to its original soundness its interpretation is accepted and *it becomes a part of the statute as much as if incorporated into the body of it*."

In *Webster v. Cooper*,<sup>5</sup> the court, referring to the construction of the Constitution of Maine by its State Supreme Court, say, "*this court receives such a settled construction as part of the fundamental law of the state*."

These carefully worded expressions of the courts, if they mean anything at all, must mean that the judicial construction of state statutes is in fact a part of the law of the state. But while not expressly contradicting the principles as here laid down, the courts have, in certain classes of cases, been accustomed to ignore them. It is submitted that if this view as

<sup>1</sup> 11 Wheat. 361 (1826).

<sup>2</sup> 4 Wall, 196 (1866), Field, J.

<sup>3</sup> *Supra*, p. 533.

<sup>4</sup> 17 Wall, 648 (1873).

<sup>5</sup> 14 How. 488 (1852).

expressed so insistently by the courts be correct, then in later decisions they have no right to disregard it. If this view of the *status* of judicial construction be unsound, then the courts should have the courage to say so and put an end to the controversy at once.

Having satisfied ourselves that the courts have laid down the rule as above stated, we will now proceed to examine cases where

*B. The courts have, in fact, treated the judicial interpretation of state statutes by state courts, as being the law, not merely the interpretation of the law.*

The best known group of cases which support the statement just given, is, obviously, that class of which *Gelpcke v. Dubuque* is the type. As these cases are all very similar in the facts involved, a few general observations may be made which will apply equally to all. In the first place they are all cases which originated in the circuit courts, jurisdiction being obtained by virtue of diverse citizenship. In the second place, in each of this line of cases, a statute previously adjudged valid by a state supreme court had been held void by the same tribunal. This question was squarely in issue. Can rights be acquired under a statute afterwards declared to be void? The courts uniformly answered the question in the affirmative provided a state court had previously held the act valid. They also said, that when those rights thus acquired, were contract rights, the federal courts would protect them by virtue of the clause in the Constitution of the United States, forbidding a state to pass a law, impairing the obligation of contracts.

One of the earliest cases to follow *Gelpcke v. Dubuque* was *Havemeyer v. Iowa Co.*<sup>1</sup> That case came before the Circuit Court of the United States for the District of Wisconsin, and the court being divided, was brought to the Supreme Court of the United States under the Act of Congress of April 29, 1802. The legislature of Wisconsin passed an act authorizing counties to issue bonds. The executive department

<sup>1</sup> 3 Wall, 294 (1865), Swayne, J.

classified the act as a local act, which took effect from the date of its passage. This view was affirmed by the Supreme Court of Wisconsin. By later decisions the Supreme Court of Wisconsin decided that this act was general in nature, was not effective until published, and that the bonds in question which had been issued before publication, were void. The Supreme Court of the United States, following and approving *Gelpcke v. Dubuque*, declared that the obligation of the contract should be protected, although the Supreme Court of Wisconsin could construe their laws as they pleased. The court unanimously speaking through Mr. Justice Swayne, say these decisions "being long posterior to the time when the securities were issued, they can have no effect on our decision and may be laid out of view. We can look only to the condition of things when they were sold. That brings them within the rule laid down by this court, in *Gelpcke v. City of Dubuque*. In that case it was held, that if the contract, when made, was valid by the constitution and laws of the state, as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it."

Two more cases very similar both in facts and decision followed *Havemeyer v. Iowa Co.* during the next three years: *Thompson v. Lee Co.*,<sup>1</sup> and *Lee Co. v. Rogers*.<sup>2</sup> Mr. Justice Davis delivered the opinion in the former and Mr. Justice Nelson in the latter, with no dissent in either case.

Shortly after this came the unfortunate decision in *Butz v. City of Muscatine*.<sup>3</sup> In this case an act had been passed by the legislature of Iowa authorizing the issuance of certain bonds. Before any judicial decision as to the validity of the statute, as far as appeared, the bonds in question were issued. A subsequent decision of the Supreme Court of Iowa de-

<sup>1</sup> 3 Wall, 327 (1865), Davis, J.

<sup>2</sup> 7 Wall, 181 (1868), Nelson, J.

<sup>3</sup> 8 Wall, 575 (1869), Swayne, J.

clared the act unconstitutional. The court refused to follow the state decision, alleging that its effect was to impair the obligation of the contract. Mr. Justice Miller dissented, making use of very strong language not unmixed with sarcastic allusions to the opinion of the majority. The Chief Justice concurred in the dissent. Whether or not the other cases discussed are sound on principle, it is submitted that this decision went beyond the bounds of authority. We have examined, as we believe, most of the leading cases on this subject, and, so far as we are able to judge, no other case has taken the position taken by Mr. Justice Swayne and the majority of the court in this case. *Gelpcke v. Dubuque* and the line of cases following it, decide only this: That whenever a Supreme Court of a state has adopted a construction for a particular local law, such construction becomes part of the local law. The court then by changing its view, practically amends the law. Such an amendment can no more have a retroactive effect than can an amendment passed by the legislature. This limitation does not, in either case, affect the amendment as to the future. Similarly, the bankrupt laws were held valid as to the future, but not in their application to existing contracts. The court recognizes the right and the duty of the state court to change its ruling, if necessary; it merely protects existing contracts.

This is very far from saying, that one who relies on his own construction of a statute, will be protected against the consequences of his own error.

Until the state court has once acted, there can be no impairment by construction. When the law is passed, contract rights acquired under it are protected from legislative repeal. When a construction of a statute has once been made, contracts made on the faith of it are similarly protected from judicial action. That is the limitation of the doctrine.

May it not be supposed that Mr. Justice Swayne leaned in this case too far one way, perhaps to counterbalance Mr. Justice Miller, who by the vigor of his language in the dissenting opinion, conveys to us the unavoidable impression that a discussion of some warmth had been precipitated. But however

that may have been, we submit with great deference that this decision stands absolutely alone, and cannot be supported, either by reason or authority.

In *Township of Pine Grove v. Talcott*,<sup>1</sup> the facts were similar to *Gelpcke v. Dubuque*. Mr. Justice Swayne, in delivering the opinion, again suffers himself to discuss the question as to the constitutionality of the state statute. He carefully goes over the question as to its validity or invalidity. It is submitted that the court had no right whatever to consider this question. It would be absurd as well as intolerable to imagine for one moment that the federal court could force a state to adopt for the future a different construction from that which its courts had settled upon. The argument, that the states should be prevented from putting a palpably wrong construction upon their statutes, cannot be supported. The obligations of a state are binding only upon its conscience.<sup>2</sup> To say that the federal court has the right to force the state to adopt a "reasonable construction" of a law, when there is no power to prevent it from repudiating its obligations absolutely, is plainly untenable. As in *Gelpcke v. Dubuque*, near the end of his opinion, Mr. Justice Swayne gives expression to the real ground of the decision. He says, "The national Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly before us, that end can be accomplished unwarrantably, no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

*Douglas v. County of Pike*<sup>3</sup> contains one of the clearest statements of this view that has been written. This case came up on a writ of error to the Circuit Court of the United States

<sup>1</sup> 19 Wall, 666 (1873), Swayne, J.

<sup>2</sup> Hare on Constitutional Law, Lecture XXXII.

<sup>3</sup> 101 U. S. 677 (1879), Waite, C. J.

for the Eastern District of Missouri. It was an action on three hundred and twenty-one coupons, detached from bonds issued by the County of Pike, Missouri. The county had been authorized, by an act of the legislature, to issue the bonds in question. This act had been repeatedly construed to be constitutional, by the highest court of the state. Long after the issuance of the bonds, another decision of the Supreme Court of Missouri held the act to be unconstitutional. Mr. Chief Justice Waite uses the following language: "The true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, *the same in its effect on contracts as an amendment of the law by means of a legislative enactment*. So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be, when the bonds in question were put upon the market as commercial paper. We recognize fully, not only the right of a state court, but its duty, to change its decisions whenever in its judgment the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones, and ordinarily we will follow them, except so far as they affect rights vested before the change was made. . . . If the township aid act had not been repealed by the new constitution of 1875, which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; *but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing.*" Unlike the opinions of Mr. Justice Swayne in similar cases, there is here no ambiguity as to the ground of the



decision. In *Anderson v. Santa Anna*,<sup>1</sup> Mr. Justice Harlan quotes the above language of Mr. Chief Justice Waite with approval and emphatically reasserts the same doctrine.

*Louisiana v. Pilsbury*<sup>2</sup> came up by a writ of error to the Supreme Court of the State of Louisiana. The case came up under the 25th section of the judiciary act; the facts involved a repudiation of bonded obligations by the City of New Orleans. This had been brought about by means both of a change of construction of existing statutes, and by a later act passed by the legislature of the State of Louisiana, and which was upheld by the decision reviewed. The doctrine that states are prohibited by the federal clause from impairing the obligation of contracts by state decisions, as well as by state statutes, was carefully considered. Mr. Justice Field with no dissent delivered the opinion of the court. Beginning on page 294, the court say, "The exposition given by the highest tribunal of a state must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it."

The discussion of this line of cases would be incomplete did we not include the Pennsylvania case of *Ray v. The Gas Co.*,<sup>3</sup> decided in 1890. In this case the plaintiff in error claimed that a contract, which he had entered into, would be impaired were the Supreme Court of Pennsylvania to follow its own ruling on a question of general law and adjudge his

<sup>1</sup> 116 U. S. 356 (1885), Harlan, J.

<sup>2</sup> 105 U. S. 278 (1881), Field, J.

<sup>3</sup> 138 Pa. 591 (1890), Clark, J.

contract void. He based his contention upon the fact that previous decisions of the Supreme Court of Pennsylvania had taken a different view of the law, and that he had contracted on the faith of such ruling. The court refused to adopt his view. They admitted the justice of his contention in all cases where such change of decision had been a change in the construction of a statute, but denied its application in the present case, because no question of the construction of a statute was involved.

The opinion clearly points out the two classes of cases and the distinction between them. The opinion of the court was delivered by Mr. Justice Clark with no dissent. On page 590 he says, "The courts of highest authority of all the states and of the United states are not infrequently called upon to change their rulings upon questions of highest importance. In so doing, the doctrine is not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary can in no sense be said to make or change the law; they simply expound it and apply it to individual cases. *To this general doctrine there is one well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute, as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment.'*"

The court then cites with approval *Douglas v. Co. of Pike*, *Anderson v. Santa Anna*, *Gelpcke v. Dubuque*, etc., and quoting at length from the opinion in *Ohio Trust Co. v. Debolt*, thus sums up the law: "This ruling applies, it will be observed, not to the general law, common to all the states, but to the laws of the state 'as expounded by all the departments of its government,' and it is held that contracts valid by these laws may not be impaired 'either by subsequent legislation or by the decisions of its courts altering their construction. The reference is, of course, to the statute law.'"

In addition a few cases which lay down the same principle are cited in the note.<sup>1</sup>

In connection with this phase of the subject, it is thought profitable to refer to another class of decisions quite similar to the one just discussed. Reference is here made to that large body of cases, where the act of the state embodies a contract made between the state and an individual. To take a typical case. The legislature of the state passes a law which confers contract rights upon an individual or upon a class of individuals. The terms of the act are complied with by these individuals, who thereby enter into a contract with the state. The state then passes another act which impairs the obligation of the contract. The State Supreme Court upholds the latter act on the ground that the former act conferred no contract rights, and since there was no contract, there could be no impairment. In such cases the Supreme Court of the United States claims the right to investigate for itself and determine whether in fact a contract exists, and then to protect the obligation of that contract from impairment. These cases are sometimes referred to as laying down the principle that the federal courts have the right to construe the state law whenever that law embodies in its terms a contract. This we believe to be too broad. In such cases the court claims the right to determine for itself whether *a contract exists*; but it does not have the right to decide as to the validity or invalidity of the act. It is submitted that while embodied in the same language, the act and the contract which it creates, are two different things. The act cannot of itself be a contract. Acceptance of its terms by those to whom the offer is made is a condition precedent. The contract is a *relation*

<sup>1</sup> *The City v. Lamson*, 9 Wall, 477 (1869); *County of Leavenworth v. Barnes*, 94 U. S. 70 (1876); *Boyd v. Alabama*, 94 U. S. 645 (1876); *Town of S. Ottawa v. Perkins*, 94 U. S. 261 (1876); *County v. Douglas*, 105 U. S. 728 (1881), Waite, C. J.; *Green v. County of Conness*, 109 U. S. 104, Bradley, J.; *Taylor v. Ypsilanti*, 105 U. S. 60 (1881), Harlan, J.; *Union Bank v. Board*, 90 Fed. 7 (1898); *Louisville T. Co. v. Cincinnati*, 76 Fed. 296 (1896); *Loeb v. Trustees*, 91 Fed. 37 (1899); *Wilson v. Perrin*, 11 C. C. A. 66 and note (1894), Lurton, J.; *Hill v. Hite*, 29 C. C. A. 549 and note (1898), Phillips, J.

between the state and the individual. That relation the court may investigate. To hold otherwise would be to deprive the federal courts of their appellate power; for what would be easier for the state court than to declare in every instance that the contract itself being void, there could be no impairment. The federal courts, having acquired jurisdiction, always have the right to determine whether a contract in fact exists, and then to protect that contract from an impairment of its obligation; they necessarily have this power as an appropriate and necessary means of enforcing the constitutional prohibition, with which duty they are intrusted. But at the same time the question as to the constitutionality of the act upon which the contract is based, is a question into which the federal courts cannot inquire. The question of the power of the legislature to pass the act is one thing; the question as to whether it actually confers contract rights is another. It is obvious that on principle this conclusion must be reached, for how can the subject matter of an act affect the power, or rather the lack of power, of the federal courts to construe it? We have shown that the power does not exist. An incident of the subject matter of the act cannot confer it. It is believed that the cases will bear out this distinction, and it is earnestly insisted that on principle no other conclusion can be supported.

The earliest leading case of this class is *State Bank of Ohio v. Knoop*.<sup>1</sup> Ohio passed an act in 1845, by which it was provided for the organization of state banks. Among other privileges, it was provided that such banks should be allowed to pay the state six per cent. of their net profits, in lieu of taxes. "This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1837, I believe, the banks, the profession and the bench, considered this as a contract and binding upon the state and upon the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio." In 1851 an act was passed, providing for the taxation of these banks. The state bank

<sup>1</sup> 16 How. 391 (1853), McLean, J.

of Ohio resisted payment on the ground that the later act was unconstitutional, because it impaired the obligation of its contract. The Ohio Supreme Court decided that the former act did not create contract rights, and on that ground upheld the later act. The question of the construction of the later act was in no way involved. Before we attempt to interpret the court's language, let us note exactly what questions were before it. In the first place, as we have seen, an act had been passed which offered certain immunities to state banks. The state court decided two questions :

(1) That under the constitution of Ohio, the general assembly had no power to pass such an act.

(2) That even if the act were valid, no contract rights were created by the particular relation here established between the state and the bank.

On these two grounds, either of which was sufficient, the state court held that there could be no impairment, since there was no contract.<sup>1</sup>

As we have pointed out, the Supreme Court of the United States has no right to consider the first question; the state court's judgment as to the validity of the state's own law, in reference to the state constitution, is conclusive. That the Supreme Court could investigate the second question, there can be no doubt. But it is plain that to reach the conclusion which they did, the Supreme Court must have decided

(1) That the law of 1845, as far as this contract, at least, is concerned, was a valid law.

(2) That a binding contract was created between the state and the bank.

That the court had the power to decide the second point is conceded. That they had not the power to decide the first question in the abstract is emphatically asserted. That in this case they had the right and the duty laid upon them to protect this contract, if one existed, is believed to be correct, but the only legitimate manner in which to do this, was to prevent the state court *in this case* from applying a later con-

<sup>1</sup> *Debolt v. Ohio Life & Trust Co.*, 1 Ohio, 564.

struction, when the contract had been entered into upon the faith of a former construction. The question then arises, had the state court of Ohio formerly held this act valid, now construed by it to be void. We gain little or no enlightenment upon this point by an examination of the opinions in *Debolt v. The Insurance Co.*,<sup>1</sup> but from the language of Mr. Chief Justice Taney in the same case when it came before the Supreme Court of the United States, we should infer that the state court had formerly construed the act to be a valid exercise of constitutional power.<sup>2</sup> The same thought is conveyed by Mr. Justice McLean in the sentence quoted above, when he declares that "for more than thirty-five years this mode of taxing had been sanctioned in the State of Ohio, by the profession, the banks and the bench."

On the principle that a state construction of a state statute, or constitution, becomes a part of the law, and contract rights acquired under it cannot thereafter be divested, we can support the conclusion in this case. That Mr. Chief Justice Taney did support the case on that ground, is evident from an examination of his opinion; but Mr. Justice McLean, who delivered the opinion of the court, did not consider this point in terms. Indeed, his remarks upon the question we are discussing do not seem entirely clear. On page 390 he says, "The rule observed by this court to follow the construction of the statute of the state by its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the state. The established construction of a statute of the state is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the state is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment."

<sup>1</sup> *Supra*, p. 554.

<sup>2</sup> See opinion of Taney, C. J., Grier with him, *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. at p. 431.

It will be noted here that the eminent justice declares that, in ordinary cases, the "established construction of a statute of the state is received as a part of the statute." The only construction of the state court which was under consideration, was their construction of the law of 1845. Mr. Justice McLean then continues, "But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union." What law does he refer to in this sentence? He cannot mean the law of 1851, because there was no question as to its construction before the court, and no one had thought of urging that its construction by the state court should be followed, for, as a matter of fact, the state court had not construed it. He cannot mean the law of 1845, because it could not impair a contract entered into after its passage. If the rest of his opinion were at all consistent with this view, we should say that he must have referred by "law" to the *later construction* of the act of 1845, for that was what, in reality, did impair the obligation of the contract. Indeed, by the following sentence, he declares this to be the fact: "The decision of the Supreme Court of the state is before us for revision, and if *their construction of the contract in question* impairs its obligation, we are required to reverse their judgment." He says in one sentence, "we are testing the validity of a law;" in the next he says, "we are judging the validity of a construction of a contract." The conclusion seems clear that he considered the "construction" to be the "law."

It is submitted that by "construction of the contract" here, is really meant the construction of the act of 1845. The learned justice does not seem to distinguish the two, and from the context we must infer that such was his meaning. Moreover, in no sense can a construction of a contract be said to impair its obligation. If this were conceded, every time a court adjudged a contract void it would impair its obligation. But this is not impairment. In such a case one merely enters into a relation, which he conceives to be a contract, but in which conception he has fallen into error. Mr. Cooley, in his



work on Constitutional Law,<sup>1</sup> says, "no promise or assurance can, therefore, constitute a contract, unless the law lends its sanction." It follows that there can be no impairment of the obligation of the contract, unless there has been a change in the law. In all other cases it is merely a mistaken conception as to what the law is.

We are able to place upon these words of Mr. Justice McLean no construction except this: that the reinterpretation of the act of 1845, by the state court, was a law impairing the obligation of the contract, and it was for that reason that the Supreme Court refused to follow the state decision, which applied that reinterpretation to the case before it.

But however this may have been, there is no question of the attitude of some of the other justices. Mr. Chief Justice Taney, concurring, announces that his opinion is embodied in his opinion delivered in *Ohio Insurance Co. v. Debolt*,<sup>2</sup> in which case, as we will show later, he distinctly places his concurrence on the principle we have suggested.

Mr. Justice Catron, dissenting, clearly recognizes the act of 1845, and the contract created under it, to be two separate and distinct things. He adopts the opinion of Mr. Justice Campbell, that *there was, in fact, no contract*. He then goes on to discuss the question of the power of the state to pass exemption laws, and then says: "General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the legislature the authority to grant by contract with individuals the sovereign power, and are we bound to hold her constitution to mean, as her Supreme Court has construed it to mean? If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity, that I suppose could exist with any one is, that the construction is not settled." He then shows the construction to be settled,

<sup>1</sup> P. 313.

*Supra*, p. 555.

declares it to be his belief that the law is invalid, and that no contract rights were created even it had been, and thus concludes: "But if I am mistaken in both these conclusions, then, I am of opinion, that by the express provisions of the constitution of Ohio, of 1802, the legislature of that state had withheld from its powers the authority to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow; the Supreme Court of Ohio having held, by various solemn and unanimous decisions, that the political power of taxation was one of those reserved rights intended to be delegated by the people to each successive legislature, and to be exercised alike by every legislature according to the instructions of the people. . . . Whether this construction given to the state constitution is the proper one, is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us, than state courts and judges can question our construction of the Constitution of the United States."

This opinion is quoted somewhat at length to show that Mr. Justice Catron draws the distinction contended for. He does not deny the power of the Supreme Court to interpret the contract for itself. He does deny its power to decide as to the validity of the act.

Mr. Justice Daniel concurs with Campbell, who dissents on the ground that there was no contract created by the acceptance of the terms of the act by the bank.

In *Ohio Life Insurance and Trust Co. v. Debolt*,<sup>1</sup> Mr. Chief Justice Taney uses the following language (the facts were as to this point identical with *Bank v. Knoop*): "This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens, during the continuance of its charter? The Supreme Court of Ohio in the case before us decided that it did not. But this charter was granted while the constitution of 1802

<sup>1</sup> *Supra*, p. 555.

was in force, and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears from the acts of the legislature, that the power was repeatedly exercised, while that constitution was in force, and acquiesced in by the people of the state. It was directly and distinctly sanctioned, by the Supreme Court of the state, in the case of the *State v. The Commercial Bank of Cincinnati*, 7 Ohio, 125.

“And when the constitution of a state, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, I think it must be regarded as the true one. It is true that this court always follows the decisions of the state courts in the construction of their own constitutions and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, *is bound to adopt the construction it received from the state at the time the contract was made.*” The Chief Justice then refers to the case of *Rowan v. Runnels*, points out that the principles are the same whether jurisdiction is acquired by virtue of diverse citizenship or by virtue of the subject matter, and continues, “Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions, which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government, and ad-

ministered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, *or decisions of its courts altering the construction of the law.*"

Having thus dealt with the argument that the court must accept the state court's judgment as to the unconstitutionality of the statute, Mr. Chief Justice Taney takes up the question of whether, in fact, a contract had been created. He first declares the right of the Supreme Court to examine "the instrument claimed to be a contract," saying, "I proceed, therefore, to examine whether there *is any contract* in the acts of the legislature relied on by the plaintiff in error, which deprives the state of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government," and after a careful and exhaustive opinion, announces his conclusion that no contract existed, and, on that ground, affirms the judgment.

In this opinion Grier concurs on all points. Catron concurs in the conclusion that no contract had been created; does not dissent from the doctrine that the early interpretation of the act must be followed in cases where the state court has changed its view, but expresses his opinion that the Ohio courts had not previously passed upon the constitutionality of the act.

Justices Daniel and Campbell also concur, while Justices McLean, Wayne, Curtis and Nelson dissent, but none of them attack the principle that the state court must be prevented from impairing the obligation of contracts by changing the interpretation of state statutes.

In interpreting the language of Mr. Chief Justice Taney, where he says the construction so long concurred in must be accepted as the true one, we must remember that the constitution of 1802 was no longer in force, and that no question could arise as to future construction. The later decision could operate only retroactively if at all. This gives his statement its true significance, while otherwise it would appear too broad.

These two decisions have been examined somewhat at

length, in order that there may be no misunderstanding in the further investigation of this line of cases, as to the points they involve. *Bank v. Knoop* and *Insurance Co. v. Debolt* are authority for the following principles of law :

(1) *When a state legislature passes an act purporting to contain a contract, there are two separate and distinct problems presented.*

(a) *Is the act constitutional?*

(b) *Has a contract been created?*

(2) *The United States Court have the right to examine for themselves whether or not a contract has been created.*

(3) *The United States Court have not the right to examine the interpretation by the state court of the constitutionality (state) of the act, but must accept it as final.*

(4) *The United States Court (having acquired jurisdiction by virtue of the fact that a later act has been passed which would impair the obligation of contracts if there were any), may refuse to apply a decision of a state court, adjudging an act void, in a case where contract rights have been acquired under a former construction by that court, adjudging it valid.*

The last principle, it will be noted, differs only from the conclusions drawn from the class of cases represented by *Gelpcke v. Dubuque*, in that in the one case jurisdiction is acquired by virtue of diverse citizenship, in the other, by virtue of the subject matter. The principle, obviously, is the same in each case. In *Farmers' and Mechanics' Bank of Pa. v. Smith*,<sup>1</sup> Mr. Chief Justice Marshall made the following very pointed statement, "that this case was not distinguishable from the former decisions of the court on the same point, except by the circumstances that the defendant, in the present case, was a citizen of the same state as the plaintiff, at the time the contract was made in that state, and remained such at the time the suit was commenced in its courts. But these facts made no difference in this case. The Constitution of the United States was made for the whole people of the Union, and is equally binding on all the courts and on all the citizens."

<sup>1</sup> 6 Wheat. 131 (1821), Marshall, C. J.

The cases cited in the note will be found to support the principle, that the Supreme Court of the United States may always construe the contract of the state, when it is alleged that the obligation of that contract has been impaired by subsequent legislation. While most of them do not deal explicitly with the distinction between the act and the contract which it helps to create, the decisions are not inconsistent with this principle.

In *McCullough v. The Commonwealth of Virginia*,<sup>1</sup> it is distinctly pointed out. On page 138 Mr. Justice Brewer says ; "Neither is the argument a sound one. It ignores the difference between the *statute* and the *contract*, and confuses the two entirely distinct matters of *construction* and *validity*. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes." Of course the question as to the *validity of the act* would arise before either of these.<sup>2</sup>

Lastly we wish to call especial attention to the case of *Pease v. Peck*.<sup>3</sup> This case came up by a writ of error to the Circuit Court of Michigan. The question here was not as to the construction of a statute, but as to what the statute in fact was. The statute of limitations, as passed, did not contain a saving clause, excepting persons "beyond seas." Such a clause was inserted in the published copy. For a long period the statute was treated by the courts as containing this provision. A copy of the original act having subsequently been discovered, and the Supreme Court of Michigan having determined that its former treatment of the statute was incorrect, it was urged

<sup>1</sup> 172 U. S. 102 (1898), Brewer, J.

<sup>2</sup> *Jefferson Branch Bank v. Skelley*, 1 Black. 436 (1861); *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116 (1861); *University v. The People*, 99 U. S. 309 (1878), Miller, J.; *Louisville & Nashville R. R. v. Palmes*, 109 U. S. 244 (1883); *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683 (1885), Harlan, J.; *Wright v. Nagle*, 101 U. S. 791; *Mobile & Ohio R. R. v. Tenn.*, 153 U. S. 487 (1893), Jackson, J.; *Huntingdon v. Attrill*, 146 U. S. 657; *Bryan v. The Board of Education*, 151 U. S. 639 (1893), Harlan, J.; *McCullough v. The Com. of Va.*, 172 U. S. 102 (1898), Brewer, J.

<sup>3</sup> 18 How. 599 (1855), Grier, J.

that the United States Court should apply the latter construction in the case before it. This the court refused to do. The language of Mr. Justice Grier is: "The territorial law in question had been received and acted upon for thirty years, in the words of the published statute. It has received a settled construction by the courts of the United States, as well as of the state. It had entered as an element into the contracts and business of men. On a sudden, a manuscript statute, differing from the known public law, is disinterred from the lumber room of obsolete documents. A new law is promulgated by judicial construction which, by retro-action, destroys vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts."

This statement, it will be perceived, is very strong. It assumes that a meaning is engrafted into a legislative enactment, that was never there. This is done by means of judicial construction.

Mr. Justice Campbell and Mr. Justice Daniel dissented, but solely on the ground that they did not think it appeared that the Supreme Court of Michigan had ever construed the statute. They expressly admitted the points of law laid down by the court.

It should be noted that Mr. Justice Grier did not deny the right of the Supreme Court of Michigan "to promulgate a new law," but only denied the right of any state court to apply that law to existing contracts. It is submitted that, if this decision be sound, it must follow as a matter of logic, that a court, by its construction, may change a law in fact. Here the law, as passed, did not contain a clause which the courts of Michigan said it did. The Supreme Court of the United States say that during that period, the law *was what the Michigan courts said it was*. This can mean only one thing. The court's declaration changed the law. It is submitted, after this examination of the cases, that, rightly or wrongly, the courts have actually decided,

(1) *Judicial interpretation of state statutes by state courts makes, in fact, a part of the law of the state.*



(2) *A change of judicial interpretation is, in fact, an amendment of the law.*

(3) *When state courts have so applied such an amendment as to impair the obligation of a contract, the federal courts, when they have acquired jurisdiction by virtue of diverse citizenship, will refuse to follow the decision, because to do so would be to apply a "law," (i. e., the altered interpretation, not its application to the contract) which impairs the obligation of contracts, and which is forbidden by the federal constitution.*

*Thomas Raeburn White.*

(To be continued.)

## A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART III.

The contention of the advocates of the theory that Mr. Curtis advances, namely, that by virtue of the Declaration of Independence, the colonies not only lost all political connection with Great Britain, but their people became united into a nation, has the support of a good many writers. But it cannot be denied that it does not seem consistent with the wording of the Declaration, or with the action of Congress in at once appointing a committee to devise and digest a scheme of *confederation*, a term which, while implying "unitedness," so to speak, equally does *not* imply oneness. The colonies are declared to be *not* a "free and independent *state*," but "free and independent *states*." Again, not "free and independent" communities, or provinces, or commonwealths, but STATES. And it is fair to presume that the word was used in its ordinary sense, that is, a community possessing what are known as sovereign powers—the right to make war and peace, etc.—as distinguished from provinces, counties, towns, townships, etc., whose public powers are of a limited and subordinate nature. Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheaton, 187, expressly concedes that prior to the adoption of the Constitution the states were sovereign and completely independent, connected only by a league. Mr. Oakley, *arg.* in the same case, had said (p. 33), "By this act [The Declaration] they became 'free and independent states,' and as such have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do." "The State of New York, *having thus become sovereign and independent*," etc., and these propositions were not controverted by the other side, the Attorney General (Wirt) saying that they "might be admitted;" and so it would seem almost beyond question that such was the understanding at

the time and for half a century afterwards. But it is vigorously argued by able writers that the separate states or colonies never were really independent sovereignties. In his invaluable treatise on the Constitution, Mr. Justice Story maintains this view, citing Mr. Charles Cotesworth Pinckney's utterances in the debates in the South Carolina legislature in 1788, on the propriety of calling a convention to ratify the Constitution. Mr. Pinckney says that the declaration is enough to refute the contention of state sovereignty; that the states are not even enumerated, and makes this remarkable statement: "The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this declaration." Mr. Adams, in the Fourth of July Oration (1831), says practically the same thing. Mr. Dane, in the appendix to the final volume of his "Abridgment," goes into the subject very extensively and reaches the same conclusion, but he was writing with a bias natural enough at a time when "nullification" and "state sovereignty" were striking terror into the hearts of all friends of the Union. Much stress is laid on the fact that there never was a moment when the states were really in a condition to act as independent sovereignties; that they all jointly declared their independence, when they were in close, armed alliance against Great Britain, and were represented in a Congress to which they had expressly or tacitly confided the duty of exercising really sovereign or national powers, and all—or nearly all—the states governments were formed during the continuance of this tie.

One can hardly help concluding, however, that if the declaration did not mean that the states were severally free and independent, it is a pity it should have been expressed as it was. And when we remember its author and his views, we can entertain but little doubt of what he intended by the words when he wrote them.

The question of "state sovereignty" under the present Constitution is a very different one, and will be considered later. Mr. Dane very properly states that our Government has existed under three forms:

1. The Revolutionary, from 1774 to March 1, 1781 (date of final ratification of Articles of Confederation).

2. Under the Articles of Confederation.

3. Under the Constitution. The first period has been briefly gone over with reference to its constitutional features, and we have come to the subject of the Articles of Confederation. It will be remembered that a committee to prepare such articles was appointed at the same time as that to prepare a Declaration of Independence—in the early summer of 1776. This resolution (for the appointment of the committee) was another indication that Congress did not consider the colonies to be united as one people by the declaration of independence, *ipso facto*, nor did they, apparently, at that time expect or desire that such a state of things should soon follow. They desire to have a plan of “confederation”—a close league. So that, without adducing other reasons, it is plain to be seen that while the colonies felt themselves to be united for the accomplishment of certain ends, while they acquiesced in, from time to time, from the necessity of the case, the exercise by the Continental Congress of sovereign or national powers and functions, history forbids us to accept the position of Curtis, Story and others, that by virtue of the declaration of independence, continental nationality became an accomplished fact. This is so clearly and ably brought out by Mr. Upshur (Secretary of State under President Tyler), in his “Review of Judge Story’s Constitution,” that it would seem to render all further argument unnecessary. It is much to be regretted that Story, and others of his school, should feel it necessary to the support of the “national” theory of the Constitution, that the colonies should be said to have been merged, except as to their domestic concerns, by the declaration of independence, and to have been even in pre-revolutionary times “for many purposes one people.” Such a position is *not* necessary to their main contention, and if it were, it is none the less untenable and must fall. But Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, stated what I believe to be the truth, as follows: “It has been said that they [the states prior to the adoption of the Constitution] were sovereign, were com-

pletely independent, and were connected with each other only by a league. This is true," etc., going on to say that all this was changed by the adoption of the Constitution.

It may be said with truth, however, that from 1774, onward, the people of the colonies gradually grew accustomed to concerted action. As before noticed, they used expressions like "All America," etc., and it is not probable that, at the time of the declaration of independence, or of the adoption of articles of confederation, they had any expectation of acting, or any desire to act, except domestically, in any other way than jointly—of *how* jointly, the articles of confederation were the outward expression.

The committee to prepare and digest a plan of confederation reported on July 12, 1776. After considerable debate, Congress, on August 20, 1776, in committee of the whole, reported a new draft. The articles were finally adopted by Congress in November, 1777, and a committee was appointed to draft a letter requesting the states to authorize their delegates to subscribe them. After reciting the all but impossibility of meeting the views of every state on every point, it earnestly recommends the articles to the dispassionate attention of the legislatures of the respective states, whom they urge to bear in mind the difficulty of combining in one general system the various sentiments and interests of a continent, divided into *so many sovereign and independent communities*; but to realize the necessity of *united action* in defence of the common liberties. All the states ratified the articles in 1778 except Delaware and Maryland, who followed their sister states in 1779 and 1781 respectively. In 1780, in urging the larger states to withdraw their claims to certain parts of the western territory, Congress reminded them that it was indispensably necessary to establish the *Federal Union on a fixed and permanent basis*, on principles acceptable to its members, essential "to our very existence as *a free sovereign and independent people*." Now, in the first letter, that of the committee, there is the distinct assertion that the continent is divided into "so many sovereign and independent communities." This in 1777. Later, in exhorting the larger states to remove one of

the strong objections of the smaller ones to entering the confederacy, they, with equal distinctness, declare the necessity of a *fixed* and *permanent* Federal Union to "our existence as a free," etc., people. During the time before they assented to the articles, to what other power were Maryland and Delaware subservient in any way? Obviously, to none. In the expression of Congress, last quoted, it will be seen plainly that that body really did desire, at least, a close and *permanent league*, that each state should to that extent clog its independence, and so that we should become "*a* sovereign and independent people." I think the language here is strong enough to warrant the assertion that there had grown in the minds of some of the leaders of the day an ideal, so to speak, which was quite "nationalistic" in character. For a *permanent and fixed league* of a character to insure existence as "*a* free, sovereign and independent people" is a pretty good substitute for a nation, in fact, is such in all but the name. For a greater or less degree of local autonomy interferes not at all with the national or non-national character of a commonwealth. But this expression, of course, did not make the desired condition an actuality. Did the ratification of the articles of confederation do so? Did the ratifiers or framers really intend that they should? Let us now proceed to an examination of these articles, bearing in mind the extreme care and deliberation with which they were prepared and adopted. As signed finally they begin with reciting under a "whereas," that the articles "of *confederation* and *perpetual union*" between the states (naming them) were agreed to by Congress, "in the words following, viz," then come the articles themselves, thirteen in number. By the first article the "style" of the confederacy is ordained to be "The United States of America." Then, in Articles II, III and IV, the position of the states toward each other is set out. Article V provides for an annual Congress. Article VI sets forth what the several states shall not do. Article VII gives the appointment of certain military officers to the legislatures. Article VIII charges upon the common treasury all war expenses, etc., incurred for the general welfare, and provides for the filling of this treasury.

Article IX sets out the powers of Congress. Article X those of the "Committee of States." Article XI provides for the admission of Canada. Article XII pledges the United States for bills, etc., emitted by Congress prior to the confederation. Article XIII declares that every state shall submit to the determination of Congress on all questions proper for its exercise; and further declares that the article shall be inviolably observed in all the states; that the Union shall be perpetual, and that no alteration shall be made in the articles unless agreed to in Congress and afterwards confirmed by the legislature of every state. Now, under another "whereas" comes the solemn affirmation of the articles of the delegates in behalf of their several states; it is so impressive that I give it in full: "And whereas, it has pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determination of the United States in Congress assembled on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual." "In witness whereof," etc., "in the third year of the Independence of America." So much for a general view of this most important instrument. I propose now to go over it carefully in detail. The first article distinctly says that what is to be formed is a *confederacy*, and that its "title" shall be the "United States," etc. Article II, the very first substantial article, declares that "each state *RETAINS*," *i. e.*, keeps what is already possessed, "its sovereignty, freedom and independence," and all other rights and powers not ex-



pressly delegated to Congress by the article. By Article III it is declared that the "said states hereby severally enter into a *firm league of friendship* with each other" for the general welfare, etc., "binding themselves to assist each other" against attacks on them, or *any of them*, on account of religion, *sovereignty*, trade, or any pretence whatever. By Article IV it is provided that citizens of the different states shall have equal privileges in any of them, thus "the better to secure and perpetuate mutual friendship and intercourse between the people of the different states," etc. It is also provided that no state shall lay an imposition duty or restriction on the property of another state or of the United States. Also, that fugitives from justice charged with "treason, felony, or other high misdemeanors in any state" shall, upon requisition by the executive power of the state having jurisdiction, be handed over to said state. Also, that full faith and credit shall be given in each state to the records, etc., of every other state. Summed up, the plain meaning of these four articles is that each state without relinquishing its sovereignty enters into a firm compact or league with each and every other state for the promotion of certain objects for their common and individual welfare. Now, that is the sort of an association it is to be. They proceed by Article V and subsequent articles to provide for the *way* in which their joint interests are to be advanced and cared for. "For the more convenient management of the general interests of the United States," says Article V, "delegates shall be annually appointed" to a Congress. Congress was to be organized as follows:

1. Delegates were to be chosen annually in such manner as the legislature of each state might direct.
2. It was to meet annually on the first Monday in November.
3. A state might recall its delegates, or any of them, at any time within the year and send others in their stead.
4. No state should have less than two or more than seven delegates.
5. No person should serve as delegate for more than three years in six.

6. During his service as delegate no person could hold any salaried office under the United States.

7. Each state was to maintain its own delegates "in a *meeting of the states*, and while they act as members of the Committee of States."

8. Each state was to have *one vote*.

9. Freedom of speech was guaranteed in Congress, and immunity from arrest, except for treason, felony and breach of the peace.

Instead of proceeding in the next article to recite and define the powers of Congress, the limitations on the several states are set out with great clearness and care.

*First.* They are forbidden to receive ambassadors from foreign powers, or send them to such powers, without the consent of the United States in Congress assembled.

*Second.* They are forbidden, without the consent of the United States in Congress assembled, "specifying accurately the purpose for which the same is to be entered into, and how long it shall continue," to enter into any alliance, etc., with *each other*.

*Third.* They are forbidden to levy duties which interfere with United States treaty stipulations.

*Fourth.* They are forbidden to maintain war vessels in time of peace, or armed force on land, except such as Congress may judge necessary for the defence of the states. On the other hand each state shall always keep up a well regulated militia, etc.

*Fifth.* They are forbidden to engage in war without the consent of Congress, or grant letters of marque, etc., except under certain emergent conditions.

By Article VII the states are to have the appointment of all officers of land forces raised for the common defence below the rank of colonel.

The following article charges, as before noted, all war expenses and others incurred for the general welfare upon a "common treasury."

Now this treasury was not to be kept full by taxes imposed "by the United States in Congress assembled," but it was to

“be supplied by the several states in proportion to the value of the land in each state,” said value “to be estimated” in such way as the United States in Congress assembled should appoint. The actual raising of the money was to be accomplished by the legislatures of the several states by levying taxes according to their good pleasure. We come now to the ninth article, wherein is set forth clearly and in detail the powers of Congress, or of the “United States in Congress assembled,” the expression always used. The powers are

1. To determine peace or war (except in case of emergency, as provided in Article VI). Sole power.

2. To send and receive ambassadors. Sole power.

3. To enter into treaties and alliances, provided that no treaty be made restraining the legislatures of the states from impositions of such duties on foreigners as their own people are subjected to, or of prohibiting any exports or imports. Sole power.

4. To establish rules as to captures on land or sea, and the division of them.

5. Granting letters of marque and reprisal in time of peace. Sole power.

6. Appointing courts for the trial of piracies and felonies on the high seas and of final appeal in case of capture. Sole power.

7. To be the last resort on appeal in disputes arising between two states.

8. To regulate the alloy and value of coin to be struck by authority of the United States or of any state. Sole power.

9. To fix the standard of weights and measures. Sole power.

10. To regulate trade and manage affairs with the Indians, not members of any state, provided that the legislative right of any state within its own tenets be not violated or infringed. Sole power.

11. Establishing and regulating post-offices from one state to another, and exacting such postage as will defray expenses. Sole power.

12. Appointing all army officers except regimental officers. Sole power.

13. Appointing all naval officers and commissioning all officers whatever in the service of the United States. Sole power.

14. Making rules for the government and regulation of such forces and directing their operations. Sole power.

15. To appoint a Committee of States "and such other committees and civil officers as may be necessary for managing the general affairs of the Union."

16. To ascertain the amount of, and to appropriate, money necessary for public expenses.

17. To borrow money and emit bills on the credit of the United States, transmitting half yearly to the various legislatures an account of the moneys so borrowed, or bills emitted.

18. To build and equip a navy.

19. To agree on the number of land forces and make binding requisitions upon each state for its quota; the legislature to appoint regimental officers and raise and equip the troops at the expense of the United States.

20. "The Congress of the United States" shall have power to adjourn, from time to time, not longer than six months.

Such were the powers of Congress, but many of the most important could only be exercised with the consent of nine states, namely, the first, third, fifth, eighth, sixteenth, seventeenth, eighteenth and nineteenth powers, and the same restriction is placed on the power to *coin money*—nowhere expressly given to the United States in Congress assembled—and to "agree upon the number of naval vessels to be built or purchased," also nowhere expressly given. And the twelfth power is also thus restricted so far as regards the appointment of a Commander-in-Chief.

All other powers are to be exercised only by the votes of a majority of the states, except the power to adjourn from time to time. In addition to an annual Congress, there was to be a Committee of States, consisting of one representative from each state. This committee, or any nine of them, were to execute in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the vote of nine states, might from time to time invest them with.

But none of the powers requiring the vote of nine states could be delegated to them.

Every line of these remarkable articles shows them to have been intended for just what the second article implies—a written expression of the terms and conditions of the close and compact association of sovereign states. There is not one word—except the provision that the citizens of one state are to have equal privileges in another—that touches the individual, or in any way concerns itself with the personal rights so stubbornly fought for, and so clearly stated by Camillus. Not a line again, of the community rights, so to speak—taxation only with representation, etc. No provision whatever for any sanction for the violation of any article. No assertion of the rights of the United States to lay any tax whatever. No provision for the representation of the people as such in United States Councils. On the contrary, a provision that each state shall have one and but one vote, and that in times of Congressional recess a Committee of States shall have the executive power within limits. It does not seem possible, to the ordinary understanding, that in the face of the plain words of the articles, and in view of their inception and adoption, any one could be found hardy enough to maintain that there was anything like national unity under this “Confederation,” or that there was ever intended to be. Such a contention is too much for Mr. Curtis, at all events, committed as he was to the proposition that the Declaration of Independence made us “one people.” He says (Vol. I, Chap. VI): “The parties to this instrument were free, sovereign and independent political communities, each possessing within itself all the powers of legislation and government over its own citizens, which any society can possess,” and lest this last sentence should be thought to qualify the first, I may quote later on from the same chapter. “This office of the confederation was to demonstrate to the people of the American states the practicability and the necessity for a more perfect union. This confederation showed . . . that there were certain great purposes of civil government which they could not discharge by their separate means ; that independence of

the Crown of Great Britain could not be achieved by any one of them, unassisted by all the rest. That no one of them, however respectable in population or resources, could be received and dealt with by the governments of the world as a nation among nations," etc., etc. Very well; if the confederation taught these lessons, and that to teach them was its "office" in American history, the lessons were not known at the time it was formed. The extreme view of the nationalists—a most unnecessary one, as it seems to me—is stated at length and with great earnestness and even desperation by Mr. Pomeroy. Naturally, he is driven into some tight corners, from which he tries hard to escape. But escape was impossible, and I can but repeat that the troubles of the extreme nationalists are largely of their own making. He gives (Const. Law, 9th Ed., p. 38, *et seq.*) the usual argument about the Declaration of Independence having been by united colonies as one, and not severally. "There never was, in fact, a moment's interval when the several states were each independent and sovereign." How odd, then, that at the time of the appointment of a committee to prepare the declaration, the very body which was to adopt it thought it necessary to appoint a committee to prepare a plan for a confederation. How can that have been thought necessary, if we were already a united nation? And as to his assertion that there never was a moment when the states were absolutely independent, what obedience did Maryland owe before signing the confederation articles, for example? But no matter, the proposition that the states were never independent sovereignties is "the key to the whole position," and must be maintained, *ruat coelum!*

"Grant that in the beginning the several states were in any true sense independent sovereignties, and I see no escape from the extreme position reached by Mr. Calhoun." Why? Because, forsooth, a community once sovereign cannot part with its sovereignty—cannot commit political suicide—vide the works of Ortolan, and other profound writers on international law. I dare say it would startle the Hawaiians, and possibly the rest of the world, to learn that Hawaii is still a sovereign state, and must remain so forever unless over-

whelmed by some outside force. Brought face to face with the articles of confederation and their really unmistakable language, he coolly says that while as "a grand historical *fact*" (italics his) the "words and the declaration were the work of, and had resulted in, one nation, *yet it must be at once conceded that the theory was not yet perfected in the minds of the revolutionary leaders, or of the people themselves,*" Was ever the like heard! As well say that the theory of free trade is not yet fully developed in the mind of an avowed and pronounced protectionist!

*Lucius S. Landreth.*

(To be Continued.)



## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### BILLS AND NOTES.

M, the father of A, was indebted to B. M had, owing to some financial trouble, placed a large amount of property in A's name. M requested A to execute and deliver **Consideration** to B a note for the amount of his, M's, debt. B sued A on the note and A defended on the ground of want of consideration. The court upheld a judgment for plaintiff, asserting that an extension of time of payment of a debt was sufficient consideration for a note of a third person for the amount of the debt, and that the acceptance of the note in payment of a debt, due from one who is not the maker, was likewise a good consideration: *Harris v. Harris*, 54 N. E. 180 (Illinois).

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#### CONSTITUTIONAL LAW.

The legislature of Nebraska passed an act (Comp. Stat. c. 93 a., Art. 2, §§ 66, 67), authorizing certain corporations to **Corporations,** levy assessments on their shares of capital stock **Stock** to defray running expenses, such assessments to **Assessments,** be a lien upon the said stock and to render it **Obligation** liable to forfeiture for non-payment thereof. The **of Contracts** A company was formed prior to this enactment and its stock was full paid and non-assessable. After the passage of the act the company levied certain assessments in accordance with its provisions, and the stockholders refused to pay the assessments and moved for injunctions to restrain the forfeiture and sale of their stock under the act. A decree was entered in their favor on the ground that they were parties to a contract giving them rights which the legislature could not infringe: *Enterprise Ditch Co. v. Moffitt*, 79 N. W. 560. The decree was manifestly right: See 1 Cook, Stock & Corp. Law, § 492; *Detroit v. D. & H. Plank Rd. Co.* (Mich.), 5 N. W. 279.

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#### CONTRACTS.

A was in the habit of insuring the fidelity of his employes in the B Industrial Guaranty Company. A person applied to

## CONTRACTS (Continued).

**Construction** A for employment and A then sent to the B company an application for insurance against loss by reason of the employment. The B company sent A a contract in which was set forth that in consideration of a certain sum it guaranteed the fidelity of the employe to the extent of \$500, a bond to that effect to be issued and this paper to stand in place of the bond until the same should be issued. Across the face of this was written, "subject to result of investigation." In a suit by A against B, on the alleged contract of guaranty, B contended that it was not a contract, but that the words written across its face made it a mere proposal on the part of the company to make a contract if the investigations proved satisfactory. The court held it would have no meaning unless it amounted to a binding acceptance, since it could not operate as a proposal, A having made the proposal for a contract. It was said that the words written across the face of the instrument must be taken to mean that the B company reserved the right to rescind the contract in case the investigations proved the risk undesirable.

## CORPORATIONS.

Decisions are rapidly being added by the courts to the list of cases dealing with the rights of a minority stockholder to interfere by injunction with the expressed will of the majority in a matter pertaining to the business management of the corporation. In *Philips v. Providence Steam Engine Co.*, 43 Atl. 598, the Supreme Court of Rhode Island has followed the principle recognized by it in *Hodges v. Screw Co.*, 1 R. I. 312, to the effect that where a sale of the corporation's business is necessary because no longer profitable, a private sale agreed to by a majority of the stockholders will not be enjoined at the suit of the minority stockholder because he considers the price inadequate, where there is no claim of unfairness, oppression or fraud. These cases recognize the principle that within the scope of its chartered authority the corporate will, as expressed by the vote of the majority, is supreme. The question of whether the business is profitable or not is clearly one of business policy and rests solely with the stockholders. The court cites in support of its decision also the case of *Treadwell v. Manufacturing Co.*, 7 Gray, 393. In that case a majority of the stockholders voted to sell the corporate assets and franchises to another corporation and to distribute to the stockholders of the retiring corporation stock of the corpora-

## CORPORATIONS (Continued).

tion purchaser in payment for their shares in the old company. The court refused to interfere at the instance of a minority stockholder who was dissatisfied with the arrangement. This case, while a sufficient authority for the decision in the principal case, seems to go rather too far, as it involves not only the question of business policy, whether the corporation should be dissolved or sold as being no longer profitable, but also sanctions the right of the majority to launch a dissenting stockholder into a new and different business from that which he contracted to enter when he purchased his stock. The principal case is, however, clearly sound: See *Lauman v. Railroad Co.*, 30 Pa. 42; *Sewell v. Beach Co.*, 50 N. J. Eq. 717.

*Burden v. Burden*, 54 N. E. 17 (New York), holds that a by-law passed by the trustees of a corporation will not be set **Minority Stockholder** aside on the suit of a minority stockholder, on the ground that its provisions are unreasonable and in excess of the powers of the trustees, so long as the trustees act within their charter powers.

Plaintiff and defendant, partners, being unable to agree in the management of their business, formed a corporation, it **Promoters' Agreements** being expressly agreed that defendant, who was manager of the business, should have a controlling interest. A promoters' agreement was executed, providing that defendant was "to take, own, and hold" 1000 shares, plaintiff 998 shares, and a third person the remaining two shares; the profits to be equally divided between plaintiff and defendant. The agreement also provided that defendant, "if he shall at any time sell or assign 998 shares of his said stock, then, and in such case, he will, without any consideration for the same, transfer the other two shares of his said stock" to plaintiff. Held, that the last provision did not prevent defendant from selling portions of his stock less than 998 shares, without transferring the two shares to plaintiff: *Burden v. Burden*, 54 N. E. 17 (New York).

## CRIMINAL LAW.

The Supreme Court of Minnesota has been recently called upon to distinguish between a bailment and a sale, in order to **Larceny, Bailment or Sale** determine the validity of an indictment for grand larceny. In *State v. Barry*, 79 N. W. 656, it appeared that wheat was deposited with the defendant

**CRIMINAL LAW (Continued).**

who gave a receipt for the same containing this clause : " Which amount, and the sum calculated by grade, will be delivered to the owner of this receipt or his order." The receipt also provided that the grain was insured for the benefit of the owner, and that the latter should pay a certain rate of storage. The defendant sold and shipped the wheat, and upon demand for the sum or an equivalent amount of grain was unable to furnish the same. He was indicted for larceny and contended that the transaction amounted to a sale. He relied upon the case, *State v. Rieger*, 59 Minn. 151. That case was distinguished by the court on the ground that the receipt there contained an option to the warehouse man to pay the bearer thereof the market price in money, less elevator charges, or to deliver the requisite quantity of the grain, and conviction was sustained.

**DAMAGES.**

The Supreme Court of New Hampshire, in the case of *Friel v. Plumer*, 43 Atl. 618, has decided that a debtor may recover damages for mental suffering occasioned by his creditor's malicious attachment of his exempt household furniture. The question whether a person may recover for mental suffering caused by malicious injury to his property, has been a mooted one. The same court, in *Kimball v. Holmes*, 60 N. H. 163, has held, that for an injury to a pet animal of a plaintiff, there may be a recovery for the mental suffering occasioned by reason of the attachment borne for the animal. The case was put on the ground that such mental suffering was the natural and proximate result of such an injury. The court in the present case very properly says, that there can be no distinction between the cases on the basis of any supposed difference between animate and inanimate objects, the question being simply one of proximate result.

In most jurisdictions practically the same result is reached through the doctrine of exemplary damages, which doctrine is not recognized in New Hampshire. See *Fay v. Parker*, 53 N. H. 342; *Bixby v. Dunlap*, 56 N. H. 456. A somewhat similar case was decided similarly in Massachusetts: *Meagher v. Driscoll*, 99 Mass. 281. The doctrine of exemplary damages does not prevail in Massachusetts: *Smith v. Holcomb*, 99 Mass. 552. In states where the doctrine of exemplary damages is recognized, mental suffering is said not to be a subject for compensation when it results from an injury to property: *Smith v. Grant*, 56 Me. 255.

**DAMAGES (Continued).**

In the same connection we may note the case of *Deyo v. Clough*, 43 Atl. 653, in which the New Jersey Supreme Court says, "The question of punitive damages is not raised. The libel was gross and the jury were properly told that they could give compensation for the wounded feelings of the libeled plaintiff." It is hard to see any distinction between the kind of mental suffering here compensated, and the sort occasioned by an injury to a plaintiff's property, for which so many courts refuse a recovery.

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**EVIDENCE.**

In *People v. Rice*, 54 N. E. 48, the Court of Appeals of New York holds that the fact that a witness has pursued for an indefinite time a study of medicine and of nervous diseases, in connection therewith, that he is a manufacturer of medicines, and the publisher of medical books, and the author of one, the subject of which does not appear, does not qualify him to testify as an expert on insanity; though the court is careful to say that if he be in reality an expert on any subject coming within the domain of medicine, he is entitled to testify as such, though he be not licensed to practice medicine.

In *Johnson v. Opfer*, 79 N. W. 547 (Nebraska), each party to a suit upon a promissory note testified of one, and only one conversation in regard to the matter in issue —the execution of the note. They differed, however, as to the time and place of the conversation. The one gave testimony of admissions made by the other; the latter offered to show what he said at the time and place when and where he claimed to have talked with the former concerning the issuable matter. The rejection of this offer was properly held error. See *Nesbit v. Stringer*, 2 Duer, 26.

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**HUSBAND AND WIFE.**

A lived apart from B, his wife. Some years before his death he put all his personal property in trust for and in the names of relatives and friends, and also made a deed of all his real estate, whose value was less than \$5000, without consideration, reserving therein to himself during his life the use and income of the land, with power to sell or mortgage and dispose of the proceeds as he might choose. A died intestate and without issue. By the Massachusetts

HUSBAND AND WIFE (Continued).

statutes the widow of such a decedent may take one-half of the lands for life, and is entitled to take his real estate absolutely, not exceeding \$5000. In a bill to set aside the conveyance, a decree was entered for the plaintiff on the ground that it was a fraud on the wife's rights: *Brownell v. Briggs*, 54 N. E. 251 (Massachusetts). The same court has held void the deed of a husband made to prevent his wife from recovering alimony: *Chase v. Chase*, 105 Mass. 385; and has allowed a wife to recover lands, which her husband had procured, to be sold upon mortgage, in order to evade his liabilities to his wife and to deprive her of her dower: *Gibson v. Hutchinson*, 120 Mass. 27.

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INSURANCE.

In the case of *Rustin v. Standard Life and Accident Co.*, 79 N. W. 702 (Nebraska), it appeared that the plaintiff, the holder of an accident policy issued by the defendant company which exempted the company from liability for any accident caused by "voluntary over-exertion;" in the performance of his duties and while attending to his work, had attempted to lift a heavy weight, and in so doing had incurred the injury for which he sought to recover under the policy. He testified that he did not estimate that the weight was too heavy for him to lift and that he had been accustomed to lifting heavier weights. It was held that he was entitled to recover, as his right to indemnity was not lost because the injury resulted from over-exertion, unless the over-exertion was conscious and intentional. This ruling is in accordance with the authorities: *Indemnity Co. v. Dorgan*, 7 C. C. A. 581; *Johnson v. Accident Co.* (Mich.), 72 N. W. 1115.

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LIBEL.

On reargument, the Supreme Court of Minnesota has reversed its decision in *McDermott v. Union Credit Co.*, reported 78 N. W. 967. See 79 N. W. 673. The court held in its former opinion that the designation of a merchant by the word "slow" in a commercial agency catalogue to indicate to its patrons that the person in question did not liquidate his debts with promptitude, amounted to a libel.

The court says in its opinion on the reargument: "Thus considered, it by clear implication asserts that the plaintiff does pay all his bills and that he does this without being pushed,

## LIBEL (Continued).

and without the necessity of leaving the claim in the hands of some one for collection or taking judgment against him, and that he does not refuse payment of his bills or break his promises to pay; neither does he let his note, when he gives one, go to protest, nor is his credit not recommended; but, on the other hand, he does not pay promptly weekly or monthly, or always on demand. Our final conclusion is that, thus considered, there is nothing in the word 'slow' that does *per se* injure a man's credit or his reputation for integrity and honesty or affect his standing in the community in the esteem and respect of his neighbors." It would seem that this is rather an ingenious explanation of a rather obvious terminology. The decision was dissented from by two judges. What, perhaps, influenced the decision as much as anything was the fact mentioned by the court that an opposite conclusion would open the door to a mass of profitless litigation.

## MORTGAGES.

A mortgage was executed under agreement that it should be subject to a prior mortgage executed to a third person. The prior mortgage was subsequently released and a new one substituted for the same indebtedness. The subsequent mortgagee thereupon claimed that his mortgage was thereby given priority. It appeared that the junior mortgagee was not misled or deceived, and parted with nothing on the faith of the release of the mortgage, and the senior mortgagee agreed to a change in this security only on condition that his priority should not be affected. Held, that the junior mortgagee did not gain a priority by the transaction: *Roberts v. Doan*, 54 N. E. 207 (Illinois).

## PLEADING.

The Supreme Court of Nebraska, in *Chicago, R. I. & P. Ry. Co. v. Young*, 79 N. W. 557, has followed the rule laid down by it in *Railroad Co. v. VanBuskirk*, 78 N. W. 514, and *Railroad Co. v. Bond*, 78 N. W. 710, to the effect that in a suit by an administrator in behalf of the widow and children of one killed by the wrongful act of another, it is a sufficient averment of damage for the declaration to set out the relationship of the parties, as a presumption of damage arises therefrom. This rule is contrary to the general trend of authority in this country: *Regan v. Ry. Co.*, 51 Wis. 599. In *Hurst v. Ry. Co.*,



PLEADING (Continued).

84 Mich. 539, it was held that an averment merely of the relationship of the parties did not even make out a case for nominal damages. The same rule is followed in England in construing Lord Campbell's act. See English cases cited in *Orgall v. Ry.*, 64 N. W. 450.

These late decisions of the Nebraska court seem to be a complete reversal of the former rule of that court which was in harmony with the authorities. See *Electric Co. v. Laughlin*, 45 Neb. 390; *Orgall v. Ry. Co.*, 46 Neb. 4. But see *City of Friend v. Burleigh*, 53 Neb. 674, and *Ry. Co. v. Crow*, 54 Neb. 747. The court recognized the departure from the old rule and justified it on the ground that the later ruling works more substantial justice.

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Fi

IN MEMORIAM.

STAM H. CARSON.

WILLS.

The Supreme Court of Wisconsin in *Re Donges' Estate*, 79 N. W. 786, has handed down a very elaborate opinion on the subject of a presumed intestacy by reason of the non-provision in a will for after-born children. In that case it appeared that the testator devised his estate to his wife, directing that she should hold it until the youngest of his children, if any are born, should attain twenty-one years of age, without directing that it should then go to such children or making any disposition of it. The court found no difficulty in holding that in accordance with the general rule

WILLS (Continued).

that the court will do its utmost to ascertain the testator's intention and will presume against an intestacy that this operated as a devise to the children on the majority of the youngest child. The question then presented itself, whether this was a "provision" for such after-born children within the Revised Statutes, Section 2286, which confer upon an after-born child the share which he would have had in the event of intestacy when the parent, by his will, makes no provision for such child. The court held that this amounted to such a provision as would satisfy the statutes and the children should take their shares under the will and not as if the testator had died intestate.

The cases on the subject of non-provision for after-born children are very numerous and are usually of small value out of the jurisdiction in which

MORTGAGES.

A mortgage was executed un-  
be subject to a prior mortgage.

Priority,  
Release of  
First  
Mortgage

The prior mortgage and a new one substituted. The subsequent mortgage claimed that his maintenance, priority. It appeared that the mortgagor was misled or deceived, and parted with the release of the mortgage, and to a change in this security only should not be affected. Held, that the subsequent mortgage should not gain a priority by the transfer. N. E. 207 (Illinois).

PLEADING.

The Supreme Court of Nebraska in *Ry. Co. v. Young*, 79 N. W. 557, held down by it in *Railroad v. Young*, N. W. 514, and *Railroad v. Young*, 710, to the effect that in behalf of the widow by the wrongful act of another, it is damage for the declaration to set aside, as a presumption of damage rule is contrary to the general country: *Regan v. Ry. Co.*, 51 Wi

Death by  
Wrongful Act,  
Averment of  
Damage

education and future provision, was not a sufficient provision for the said children, although the testator distinctly declared in his will that he so regarded it. It has also been held that such a provision must not be postponed or reversionary: *Bowen v. Hoxie*, 137 Mass. 527; *Rhodes v. Weldy*, 46 Ohio St. 234; *Waterman v. Hawkins*, 63 Me. 156; *Potter v. Brown*, 11 R. I. 232; *Willard's Est.*, 68 Pa. 327.

# THE AMERICAN LAW REGISTER

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## IN MEMORIAM.

WILLIAM H. CARSON.

In the sad and untimely death of Mr. William H. Carson, who met his fate at the hands of an assassin at Belmar, N. J., on August 13th last, we lose one of the most promising members of the junior bar and a man whose character stood for everything that was good and noble. We not only feel his great loss as a valuable contributor to this magazine and as a teacher, but as a man who had the interests of the University at heart and as one of the staunchest friends of the Law Department.

After graduating from the Academic Department of John Hopkins University, Mr. Carson pursued a course of law at Harvard,

from which institution he was graduated with high honors. He then associated himself with the Hon. Edward A. Armstrong, and subsequently was appointed to fill the office of Assistant Prosecutor of the Pleas of Camden County, New Jersey, which office he filled with great tact and intelligence until his death.

Mr. Carson's connection with the Law Department of the University of Pennsylvania began two years ago, when he was appointed a lecturer on law. Since then he has conducted a very successful course on the "Law of Carriers." He was a bright and intelligent man, with much ability and a most promising public career before him. He took a very conspicuous part in all reform movements, and during his incumbency as Assistant Prosecutor, was instrumental in bringing about the conviction of many violators of the law.

His loss is deeply felt by his many friends and brothers in the legal profession, not only in the community in which he lived, but in Philadelphia as well.

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CONSTITUTIONALITY OF STATE STATUTE IMPOSING AN ATTORNEY'S FEE AS A POLICE REGULATION; FOURTEENTH AMENDMENT. The Supreme Court of the United States in the case of *Atchison, &c., Ry. v. Matthews*, 19 Sup. Ct. Rep. 608 (April 17, 1899), affirmed the constitutionality of a statute of Kansas (Sess. Laws, 1885, p. 258, c. 155, §§ 1, 2), requiring a reasonable attorney's fee for the plaintiff to be allowed against a railroad company for damages from fire caused by the operating of its trains, and also changed the rules of evidence in favor of the plaintiff in such a case, so that mere proof of damage should be *prima facie* evidence of negligence against the railroad in such cases. The statute made no provision for recovery by the railroad of a reasonable attorney's fee in case it won the suit. It was argued that this was class legislation inasmuch as railroads were singled out and alone made subject to such penalties, and, moreover, were denied equality before the law, since in such a suit, it might in any case lose, but in no case recover an attorney's fee. The majority of the court in sustaining the validity of the statute pointed out the two classes of cases in which such regulations had been attempted; one being where the imposition was in the nature of a penalty for not paying a debt, and the other where it was in the nature of a police regulation. In the former it would not be sustained, while in the latter it would be. They then decided that this statute was a police regulation, in view of the great danger from fire in a state like Kansas, and the necessity of enforcing the utmost precautions to guard against it. They meet the argument that the statute conflicts with the Fourteenth Amendment by pointing out that the amendment does not forbid classification, and cite numerous cases to show that the Supreme Court has upheld classifications so long as they were not arbitrary. One of the most recent cases of importance of this kind is *Magoun v. Bank*, 170 U. S. 283 (April 25, 1898), upholding a classifica-

tion of decedents' estates based purely on the size of the legacies therein. As Mr. Justice Brewer pointed out in his dissenting opinion in that case, such a classification would seem to be as purely arbitrary as it would be possible to make one.

In the present case Mr. Justice Harlan (with whom concurred Mr. Justice Brown, Mr. Justice Peckham and Mr. Justice McKenna) delivered a dissenting opinion in which he discusses the question at great length and in a most interesting manner, pointing out that the inequality such a statute puts upon the parties to such a suit, and also the way in which railroads are picked out and set apart from other persons, natural and artificial, and denied rights given to all the others. He denies that this is properly a police regulation, but merely a penalty, and that the decision is inconsistent with that of *Ry. Co. v. Ellis*, 165 U. S. 150 (Jan. 18, 1897). He holds the classification of railroads as such for purpose of imposing penalties to be purely arbitrary. The court seems to be in a hopeless state of confusion over this subject of classification under the Fourteenth Amendment, for Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice Peckham and Mr. Justice McKenna all concurred in the judgment of the court in the Magoun Case, while Mr. Justice Brewer, who dissented in the Magoun Case, concurs in the judgment of the court in the present case. It is unfortunate that on a question of such importance, and one occurring so often, as what is a proper classification within the Fourteenth Amendment, the Supreme Court of the United States cannot formulate some definite rule or policy and present a united front and thus dispel doubt and discourage litigation on this troublesome question.

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## BOOK REVIEWS.

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THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. BALLARD and EMERSON E. BALLARD. Volume V. Logansport, Ind.: Ballard Publishing Company. 1899.

The fifth volume of Ballard's Annual differs in no important respect from its predecessors. The plan, while unique, is no longer novel, as the profession has become accustomed to it by the use of the four volumes previously published. The work is carefully arranged and shows a just discrimination in the indication of the relative merits of the cases cited. The editors claim that no decision on a point of real property has been omitted. The book is far more satisfactory than any digest could be for the purpose of finding the authorities, and goes further than a digest in that it gives enough to show which of a number of cases is the one the reader needs for the particular point he is looking. It is intelligent and intelligible, which most digests are not.

O. J. R.

**STUDIES OF INTERNATIONAL LAW.** By THOMAS ERSKINE HOLLAND, D. C. L. Oxford: Clarendon Press. 1898.

Mr. Holland's treatise on International Law is especially welcome at this time, when so many new and interesting national questions are arising. The volume is a collection of papers and lectures that were from time to time written and delivered by Mr. Holland, arranged together into a connected whole by means of running notes. The book is divided into four parts: Part I, Law of War; Part II, Illustration of the System of International Law; Part III, The Eastern Question; Part IV, Biographical Sketches.

The first two chapters of the book are, respectively, a lecture on Alberica Gentili, one of the earliest jurists of authority on international law, and a predecessor of Grotius, and a lecture on early literature of the ethics of war. These two lectures describe the origin of international law, and its gradual growth into a system out of a mass of heterogeneous theories. In the remainder of the first three parts of the book the author treats of various modern questions of international law, and in particular of the several important European conventions that have met to discuss some phases of national comity, the treaties that have been made, and the part that the more recent great wars played in the development of the international legal code. Part IV is a collection of sketches, written in French, which were delivered by Mr. Holland before the Institute of International Law. The book is a thorough exposition of the diplomatic history of Europe during the nineteenth century, and is a valuable addition to the numerous works on international law.

*S. M. I.*

**A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW.** By ARTHUR ENGLISH. Washington: Washington Law Book Co. 1899.

Mr. English's dictionary is in every sense a complete legal lexicon. The definitions are concise and comprehensive and so clear as to be intelligible to those unacquainted with the phraseology of the law. A "dictionary proper," the author states in his preface, "should be confined to words and the definitions of those words. It should be neither a digest nor a collection of essays or briefs." Mr. English has followed out this idea in his work. All the ancient and modern law terms, used by a lawyer in his daily practice, are defined with precision, while purely statutory and judicial definitions are sensibly omitted. A complete system of cross references prevails in all except leading subjects, which are complete in themselves. Maxims and phrases have been purposely excluded, because in the author's opinion "they belong to a different work." The volume is supplemented by an appendix containing the Constitution of the United States, the Magna Charta, and abbreviated titles of various legal reports and books.

*S. R. D.*

## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**PRINCIPLES OF CONSTITUTIONAL LAW.** By THOMAS M. COOLEY.  
Boston: Little, Brown & Co. 1898.

**POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE.**  
Edited by JOHN CUTLER. London: Butterworth & Co. 1898.

**PRACTICE IN ATTACHMENT AND GARNISHMENT OF PROPERTY IN THE STATE OF OHIO.** By JAMES M. KERR. Norwalk, Ohio: The Laning Printing Co. 1898.

**A TRUSTEE'S HANDBOOK.** By AUGUST P. LORING. Boston: Little Brown & Co. 1898.

**THE LAW OF DEBTOR AND CREDITOR.** By RUFUS WAPLES. Chicago: T. H. Flood & Co. 1898.

**EXPERIENCE IN THE UNITED STATES SUPREME COURT.** By A. H. GARLAND. Washington, D. C.: John Byrne & Co. 1898.

**THE ELEMENTS OF MERCANTILE LAW.** By T. M. STEVENS. London: Butterworth & Co.

**THE LAW OF NEGLIGENCE.** By THOMAS W. SAUNDERS. Second Edition; revised by E. BLACKWOOD WRIGHT. London: Butterworth & Co. 1898.

**HISTORY OF THE LAW OF REAL PROPERTY.** By KENELM EDWARD DIGBY. Fifth Edition. Oxford Press, London and New York: Henry Frowde. 1897.

**THE FEDERAL COURTS.** By CHARLES H. SIMONTON. Richmond, Va.: B. F. Johnson Publishing Co. 1898.

**THE ANNOTATED CORPORATION LAWS OF ALL THE STATES.** By ROBERT C. CUMMING, FRANK B. GILBERT and HENRY L. WOODWARD. Three Volumes. Albany: J. B. Lyon Company. 1899.

**GENERAL DIGEST, AMERICAN AND ENGLISH.** Vol. VI. New Series. Rochester, N. Y.: Lawyers' Co-operative Publishing Co. 1899.



**LEGAL DECISIONS, MEDICAL.** By W. A. PURRINGTON, of the New York Bar. New York : E. B. Treat & Co. 1899.

**AMERICAN PRACTICE REPORTS.** Vol. I. Edited by CHARLES A. RAY, LL.D. Washington : Washington Law Book Co. 1899.

**STATE TRIALS.** By CHARLES EDWARD LLOYD. Chicago : Callaghan & Co. 1899.

**PROBATE REPORTS, ANNOTATED.** Vol. III. By FRANK S. RICE. New York : Baker, Voorhis & Co. 1899.

**THE GROWTH OF THE CONSTITUTION.** By WILLIAM M. MEIGS. Philadelphia : J. B. Lippincott Co. 1900.

**NERVOUS AND MENTAL DISEASES.** By ARCHIBALD CHURCH, M. D. Philadelphia : W. B. Saunders. 1899.

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## SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

PART III.

### SECTION V.—DISCUSSION OF THE CASE ON PRINCIPLE.

It is neither possible nor desirable in the scope of this paper to go deeply into the subject of judicial legislation, nor is such its purpose. This work was undertaken, primarily, to show that the Supreme Court of the United States is holding two inconsistent positions. If we succeed in showing that, on principle, one of the two must be abandoned we shall feel amply repaid. This inconsistency will be dealt with in the section on Jurisdiction. The present section will be devoted to an endeavor to develop a little more clearly than the cases disclose the theory upon which the courts have been working to reach the conclusions which we have just noted, and to a discussion of the soundness or unsoundness of that theory.

What the courts have said, whether rightly or wrongly, is this: The legislature passes a law, which we will call *A*. The State Supreme Court interprets the law to be valid; this interpretation which is final and conclusive, we will call *B*. The

two combine and the law becomes  $AB$ , and is now complete. Subsequently, the court declares the law void. This last interpretation we will call  $V$ . The question before the court was this: Are rights acquired under  $AB$  to be lost by construction  $V$ , and the court said No.

The reasoning runs about as follows: One who relies upon the faith of  $A$  really relies upon the accuracy of an interpretation, which he has himself, put upon the words of the act. He may think that the act is valid, when it is really void, but he cannot complain for a loss occurring through his own error, and is not, therefore, protected. The theory is that  $A$  alone is incomplete, because the legislative body in this country has no power, as in Europe, to pass upon the validity of its own statutes, and thus to guarantee rights from the moment of their passage; that no rights, therefore, can be acquired until the proper court has declared authoritatively that the law is valid. But as soon as this has been done, then the individual is fully protected. He is protected as to  $A$ , because the legislature cannot impair his contract by its repeal; he is protected as to  $B$ , because the court cannot impair his contract, by varying its ruling and declaring the law void. This, in brief, is without question what the courts have laid down as law, in those cases which we have examined.

To reach this conclusion it is, of course, necessary to hold that rights may be acquired under a statute afterwards declared to be void. This, in turn, rests upon the theory that a judicial decision, when it construes a state statute, does not merely interpret, but helps to make the law, and that a subsequent judicial decision altering that construction is a "law," within the meaning of the federal clause forbidding the state to pass "laws" impairing the obligation of contracts; and that the federal courts may, for that reason, refuse to apply it. In other words, the whole principle at the bottom of *Gelpcke v. Dubuque*, and all the cases following it, rests upon the assumption, not expressed, it is true, but there, nevertheless, that the function of the Supreme Court of a state, when determining the validity or invalidity of a state statute, is, in its nature, a legislative and not a judicial function.

We fully realize that we shall be treading on very delicate ground if we consider a theory which recognizes that a court's decision may partake of a legislative character. Most of those writers who have supported the case, have carefully avoided the admission that the decision involves this theory, or else have contented themselves with the simple statement that the courts have decided the matter. We do not feel satisfied to stop at this point. We believe, in the first place, that it is a more honest treatment of the case to take the bull by the horns, and admit the principle in its full significance, and, in the second place, we are desirous to see if the rule can be harmonized with the great body of law, of which it forms a part.

*A. The rule in Gelpcke v. Dubuque has never been disputed by authority.*

Under this phase of the question we will start with the statement, upon which some writers have been content to rest their support of this case, that in this country the courts have laid it down as a rule of law that whenever the Supreme Court of a state determines as to the validity of a statute such decision makes a part of the law of the state—*i. e.*, it is a decision of a legislative character. In opposition to this it is said that it is an ancient and uncontradicted principle, that the courts do not make or change the law, but that they merely expound and apply it; therefore, when a decision is reached, the true theory is that the law always was as last expounded. This was Mr. Justice Miller's great argument in his dissenting opinion in *Gelpcke v. Dubuque*. He says if the courts declare a law void, then it is void absolutely from the beginning, and no rights can be acquired under it.

As we have shown, the courts have absolutely repudiated this view, for they have enforced rights thus acquired in a long line of well-considered opinions. In answer to the argument advanced by Mr. Justice Miller and others, who press the general rule as to the function of courts and judges, it is said: "To this general doctrine there is one well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as

contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'"<sup>1</sup>

To this it is replied: "But there can be no exception to a universal and positive rule of law, and unless you can show some *reason* for your exception you cannot support it on principle." This, then, is now the situation—one side pointing to a long line of Supreme Court decisions to justify the exception, the other citing a positive rule of law.

We wish, at this point, to go a step farther. We propose to show that the rule, as developed in these cases, is not really an exception at all, because the general rule adduced by Mr. Justice Miller *et al.* does not apply to it; but that is a rule, absolutely unique, concerning which there is no authority except in this country.

The rule that courts never make or change, but only interpret, law, was imported into this country from the common law of England. We do not admit nor deny the principle as applied to the common law, though we confess a secret feeling of approval with which we read the language of an old English judge who declared that he, for one, could not understand the theory that the common law had always existed, unknown to man, from the beginning of time, and that the courts were still striving to find out what it was; and who intimated his belief that he himself, together with his companions, was helping to make that same common law.

But, however this may be, we confine our remarks strictly to cases where state courts are interpreting the validity of state statutes, and we say that the rule, as existing in England, has no application to the case where a court is passing upon the validity of a state statute, because in England *the courts have not, and never have had, the power to pass upon the validity of an act of Parliament.*

Not only is this true of England, but of all other countries as well. Mr. Hannis Taylor, in his work "The Origin and

<sup>1</sup> Ray v. Gas Co., *supra*, p. 550.

Growth of the English Constitution," speaks of this peculiarity in American law; and we must remember that the same remarks will apply to the national and state courts, for they both have the same constitutional power to judge of the validity of legislation.

He says :<sup>1</sup> "The Supreme Court of the United States has no prototype in history. Judicial tribunals have existed as component parts of other federal systems, but the Supreme Court of the United States is the only court in history that has ever possessed the power to finally determine the validity of a national law. Such a jurisdiction necessarily arises out of the American system of constitutional limitations upon the legislative power—a system under which all judges, both state and federal, possess the power, in their respective spheres, to pass upon the validity of every law that can emanate from a state or federal legislature. In the English system such a jurisdiction could not exist, for the reason that the English Constitution imposes no limitation upon its legislative assembly; there is no 'higher law' by which the English courts can test the validity of an act of Parliament."

Without, at this point, going into the question as to whether the function of the court in such cases is actually legislative or judicial, enough has been said to show that the rule of law adduced to overthrow the theory of these cases ought not to be given an authoritative position. To say that in England courts do not make, but only interpret, the common law, does not prove that courts in America do not exercise different functions when performing a different service.

Eliminating that precedent, we have left only the authority of the United States Supreme Court. The principle of *Gelpcke v. Dubuque* has never been questioned in that court. The cases have refused full recognition to the doctrine by disallowing writs of error to state courts, as we shall show in the last section, but they have not attempted to overturn the foundation principle.

That principle is a unique rule, developed exclusively in this

<sup>1</sup> 4 Ed. Vol. I, p. 73.

country, and is an outgrowth of our peculiar system of laws. Unless, therefore, the principle which we have shown to be at the bottom of *Gelpcke v. Dubuque* is intrinsically wrong, the case must be considered to be good law.

We will ask a further indulgence at this point, that we may devote a portion of this section to the purpose of investigating whether it may properly be said that the power to pass authoritatively upon the validity or invalidity of an act of legislature is a power appertaining to the legislative department of government, or whether it is more correctly called a strictly judicial function.

*B. Is the function of American courts, when deciding as to the validity of legislative acts, a legislative or judicial function?*

We shall discuss this question under three topics :

- (1) The *status* of the power to negative legislative acts in European countries.
- (2) An examination of the opinions of the framers of the Constitution, as expressed in the federal convention.
- (3) The manner in which the exercise of the power was received by the country.

#### (1) THE STATUS OF THE POWER TO NEGATIVE LEGISLATIVE ACTS IN EUROPEAN COUNTRIES.

As we are now about to discuss the nature of a power, granted over one hundred years ago to one department of our government, it is of the highest importance to see where that power had hitherto rested in European countries, and what was the prevailing opinion as to its nature.

There are two distinct methods of interpretation of laws, recognized by both civil and common law.

- (a) *Authentic interpretation*, which decides the validity or invalidity of the law.
- (b) *Judicial interpretation*, which, according to certain rules, interprets the meaning of the law-making power.

The first belongs to the legislative power; the second to



the judicial. We find this rule laid down in "Merlin's Repertoire :"

*"C'est au législateur qu'il appartient naturellement d'interpréter la loi : ejus est legem interpretari cujus est legem condere. C'est une maxime tirée du droit romain. Quis enim (disait l'Empereur Justinien dans la loi 12 C. de legibus), legum enigmata solvere et aperire idoneus esse videbitur, nisi is cui soli legislatorem esse concessum est. En France nos rois se sont toujours réservé l'interprétation de leur ordonnances."*<sup>1</sup>

Authentic interpretation has always been considered, in the European countries, as a function of the supreme law-making power. It overrules the interpretation of judges, if the two conflict. It is said that this must be true, otherwise the legislative body would be deprived of part of its legitimate power, which would thus be given over to the courts.

The German view is well expressed in the case of *K. and others v. The Dyke Board of Niedervieland*:<sup>2</sup> "The constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights." This power, declared to belong to the legislative body, is, it will be noted, precisely the same which our courts possess of determining if the law be contrary to "well-acquired rights," or, in other words, if it be in contravention of the will of the people, as expressed in their constitution.

In Switzerland, where they have a written constitution very similar to ours, we find this rule even more plainly laid down. J. M. Vincent, in his book entitled "State and Federal Government in Switzerland,"<sup>3</sup> says: "Contrary to the practice of American courts, the Swiss cantonal tribunal does not try acts of the legislature, because the legislature is regarded as the final authority on its own act." Here the function which the

<sup>1</sup> Cited in Brinton Coxe's "Judicial Power and Unconstitutional Legislation," p. 60.

<sup>2</sup> Decisions of the Reichsgericht in Civil Causes, Vol. IX, p. 233.

<sup>3</sup> P. 34.

Swiss declare to be a legislative function is exactly the same which we have delegated to our judiciary—*i. e.*, the right to decide between the authority of the constitution and of the law enacted by the legislature.

Turning now to the country from which we derive more directly our system of law, we find the same idea followed out. Blackstone<sup>1</sup> says: "But if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that, where the main object of a statute is unreasonable, the judges are at liberty to reject it, for that were to set the judicial power above that of the legislature, which would be subversive of all government." At the same time, Blackstone recognizes the truth of the observation made by Locke,<sup>2</sup> where he says: "There still remains inherent in the people a supreme power to remove or alter the legislature, when they find the legislative act contrary to the trust reposed in them."

Thus we have, in all events, the same situation as in our country, where the sovereignty resides in the people ultimately, but immediately in their representatives. And, in this same situation, Blackstone declares that for the courts to have the power to choose between the will of the people and the will of Parliament, would be to usurp the power of the legislature.

In *Notley v. Buck*,<sup>3</sup> the court say: "The words may probably go beyond the intention, but if they do, it rests with the legislature to make an alteration; the duty of the court is only to construe and give effect to the provisions."

It is, of course, impossible to give anything approaching a thorough discussion of so great a question in this paper, but enough has, perhaps, been said to illustrate the point. We again recall the fundamental distinction between the two interpretations, the authentic or the authoritative, and the purely

<sup>1</sup> Vol. I, p. 91.

<sup>2</sup> Of Parliament, p. 49.

<sup>3</sup> 8 Barn. & Cress. 160.

judicial. The latter does not enter into the discussion, for no one questions the principles applied to it; but we have now endeavored to show that the leading countries of the old world have recognized with great unanimity that the former interpretation belongs to the power which makes the law. Hobbes says: "The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law."<sup>1</sup>

This power, thus recognized to be legislative in its character, is in America delegated to the Supreme Courts of the United States and of the several states. The question then arises: Is there any ground for the statement that this power, when in this country it is given to the courts, loses its legislative character and becomes purely a judicial function? We are inclined to answer that question in the negative. We are unable to conceive how a change of the body which executes the power can change the inherent nature of the power itself.

Bowyer in his "Readings Before the Middle Temple," enunciates the theory, in pursuance of which so many writers and judges have said the power of the courts to pass upon the validity of a state statute is a purely judicial function. He says:<sup>2</sup> "But the American courts are invested with a jurisdiction unknown to the constitution of this country. The Constitution of the United States is a written constitution, erected by delegation of powers from the people to the government; and the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. . . . It follows from these fundamental principles, which, indeed, belong to every federal polity, that the constitution is the supreme law which is the test of the validity of all other laws. And the principle so well laid down by Montesquieu, that the legislative must be separated from the judicial power, applies to the instrument of the constitution. It follows that the power of interpreting the laws, vested in the national courts, involves necessarily the function to ascertain whether

<sup>1</sup> Cited in Austin's Jurisprudence, Vol. I, p. 201.

<sup>2</sup> P. 81 *et seq.*

they are conformable to the constitution or not; and if not so conformable, to declare them void and inoperative. As the constitution is the supreme law of the land, it becomes the duty of the judiciary, in a conflict between the constitution and the laws, either of Congress or of the state, to follow that only which is of paramount obligation. . . . The judicial power is thus made the guardian of the constitution. . . . This does not imply a superiority of the judicial over the legislative power, though as a general proposition the authority which can declare the acts of another void is superior to the one whose authority may be declared void by the former. The theory of the law on this subject deserves some examination. The act of a delegated authority, contrary to the commission or beyond the commission under which it is exercised, is void. *Diligenter fines mandati custodiendi sunt: nam qui excedit, aliud quid facere videtur.* He who acts beyond his commission, acts without any authority from it. Now the judicial power can declare void the acts of the legislative power, where those acts are beyond the delegated power of the legislature, and, therefore, not legislative acts except in form only. Thus the judicial power is not placed above the legislative power, because the former must obey the valid acts of the latter."

This eminent writer first admits that the power to pass upon the validity of legislative acts is in all other countries a legislative function, then he declares in America it naturally belongs to the courts because

- (a) The Constitution is the supreme law of the land and
- (b) The Federal Government is one of delegated powers.

It is conceded that the power exercised by the American courts, if exercised by English or Swiss or German or French courts, would be legislation; but, it is said, it is in America a judicial function, because the court does not of its own authority adjudge the law void, but merely chooses between two laws, and enforces the one which is paramount.

To support this distinction is to declare that in all countries, except the United States, the legislative power is absolutely independent of all constitutional restriction, which is far from

true. In Switzerland they have a written constitution very similar to ours. The people are recognized fully as the sovereign power. What then is the function of the legislature of Switzerland? It determines, as a matter of interpretation, that a particular law is consistent with the written constitution, when it passes that law. This interpretation is authoritative and final. The same function is exercised by the legislature of Germany as we have seen. The legislature first decides that a law, if passed, will be consistent with "well-acquired rights," then it passes the law. This interpretation is nothing but a balancing of the proposed law against the acknowledged limitations imposed by the German Constitution. In England, as we have pointed out, the law recognizes the ultimate sovereignty to be in the people. It also recognizes Parliament to be the supreme legislative power; but by no means does this mean that Parliament is actually unlimited. Its acts must conform to the English Constitution, as evidenced by that great body of definite and clear, though unwritten, precedents. It is said that Parliament technically has the power to pass any law, no matter how unreasonable; but, at the same time, it is conceded that practically Parliament cannot do that, because, as Locke says, the people would deprive them of the power of which they have proven themselves unworthy. Because the English people do not possess the machinery which we do, their power is not any the less real, nor any the less potent. Now when Parliament goes to pass a law, what does it do? It frames the bill, and then in the exercise of its power to authoritatively interpret, decides that the law will be consistent with the rights of the British people.

This is done both by debate in the House of Parliament, and by obtaining the opinions of judges, who not only sit in Parliament for that purpose, but are expressly called in to give their opinions in doubtful cases.

The constitutionality of the act is passed upon just as much as if Parliament first blindly passed it, and then delegated the authoritative power to interpret to a court. The act of passing the law decides both points as a finality. Is this any less

real interpretation of a statute than the interpretation which we exercise in this country?

We confess our inability to see the distinction contended for by Mr. Bowyer. The constitution is recognized to be the supreme law of the land in each of the four countries which we have mentioned, and in at least two written constitutions are *expressly declared* to be the supreme authority. As we have shown, the act of interpretation, as performed by the legislatures of those countries, is in its nature the same in all respects as is performed in America by the courts. In both cases the interpretation is a determination between two laws: the constitution and the will of the legislative body, expressed on the one hand by a bill framed, on the other, by a law passed. In the one case the power to interpret its own laws is recognized to be inherent in the legislative body. In the other, that power is taken away from the legislature by the people and given to the judiciary. Does that make it less a legislative power? We are unable to see how the instrument by which the power is executed can change its inherent nature.

In the second place, Mr. Bowyer says that contrary to European governments, the Federal Government of the United States is one of purely delegated powers. We believe this difference to be mainly one of degree, in that the limits beyond which our governmental acts cannot be carried, are more sharply defined, but we will avoid the whole discussion by again calling attention to the fact that we are dealing only with the power of a state court to declare a state statute void, and that the state governments are governments not of delegated, but of inherent powers. Mr. Bowyer's remarks upon this point have no application to our discussion.

We respectfully submit at this point the following conclusions:

(a) *The power given to the Supreme Courts of the United States and of the several states, to authoritatively interpret laws passed by their respective legislatures, is precisely the same power as that exercised by the legislative bodies of Europe, i. e., the power to decide between the expressed will of the legislature, and the constitution of the state.*

(b) *This power is recognized in all nations, except the United States, to belong, as of inherent right, to the legislative department of government.*

It is proper to remark here that all this discussion is quite apart from the right of any court, when applying a statute, to judicially determine the meaning of its words.

(2) AN EXAMINATION OF THE OPINIONS OF THE FRAMERS OF THE CONSTITUTION, AS EXPRESSED IN THE FEDERAL CONVENTION.

After this rather limited discussion, we have arrived at the conclusion that the power to authoritatively determine between the fundamental law of the land, and a law passed by the legislative body of that land, has always in Europe been deemed to be a power appertaining to the legislature. Keeping that thought in mind, we now desire to devote a portion of this section to a brief investigation of the manner in which our courts were granted these extraordinary powers. In conducting this investigation, three things will be considered :

- (a) The end which the framers of the Constitution had in view.
- (b) Methods proposed, by which it was intended to accomplish this result.
- (c) The clause or clauses in the Constitution, by virtue of which, the courts obtained the power to pass upon the validity of legislative acts.

(a) THE END WHICH THE FRAMERS OF THE CONSTITUTION HAD IN VIEW.

There is no difficulty in determining the purpose of the framers of the Constitution during the debates and proposals culminating in the delegation of the whole question to the judicial department. This intention was, to use the expression most often heard, "to put a check upon the legislative department."

The statesmen of that day had had a severe object lesson of the evils that could be inflicted by an unlimited legislative



body, and they determined to provide against a repetition of the experience.

It had already been provided in the proposed constitution, that the powers of the legislature should be exercised only within certain limits, but it was recognized that this was not sufficient. It is true we find occasional references to the power of the courts in such cases, but it is plain that the members of the convention fully realized that, without more, the legislative department would be dangerously powerful, because they still retained the power to decide, whether their action was, in fact, contrary to the Constitution. As will be shown later, various plans were brought forward to accomplish this purpose, *i. e.*, to make some power, outside of the legislature itself, the judge of the validity of its laws.

Now, if, as is sometimes contended, the decision of this question is purely a judicial one, why was any further guarantee necessary? The same constitutional limitations, which we have to-day, had already been drafted. The courts were provided for, and to them it was proposed, of course, to give full *judicial* power. It seems reasonable to suppose that the idea that the legislature was the natural interpreter was present in the minds of the men who were engaged in framing the Constitution.

This is indicated by the language of Mr. Bedford, when discussing a proposed check on the legislature. The report reads: "Mr. Bedford was opposed to every check on the legislature, even the council of revision first proposed. *He thought it would be sufficient to mark out in the Constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments. The representatives of the people were the best judges of what was for their interest, and ought to be under no external control whatever. The two branches would produce a sufficient control within the legislature itself.*"<sup>1</sup> Mr. Bedford said, "It would be sufficient to mark out the boundaries to the legislative authority" in the Constitution, and gave as his reasons, that in

<sup>1</sup> V. Elliot's Debates, 153.

his opinion the representatives of the people are the best interpreters of legislative acts. Clearly Mr. Bedford thought that in the absence of express provisions to the contrary, the legislature would be the interpreter. We conclude that the convention recognized that some express provision must be inserted, in order to take away from the legislature inherent right to decide as to the validity of its own laws.

(b) METHODS PROPOSED BY WHICH IT WAS INTENDED TO ACCOMPLISH THE RESULT.

The first problem that seems to have presented itself to their minds, was how to force the states to observe the constitutional restraints laid upon them. They seemed to recognize that the extent of the constitutional restraints was to be judged by the legislative department. The question was, by which one, the national, or the state. Mr. Langdon, when a proposition to give this power to the federal legislature was before the convention, said: "He was in favor of the proposition. He considered it as resolvable into the question, *whether the extent of the national Constitution was to be judged of by the general or state governments.*"<sup>1</sup> He seemed to recognize but the two alternatives.

In pursuance of this purpose, and recognizing this principle, the following resolution, embodied in the Virginia plan, was proposed to the convention by Mr. Randolph:

"*Resolved . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states contravening, in the opinion of the national legislature, the articles of the Union, or any treaty subsisting under the authority of the Union.*"<sup>2</sup>

This proposition, to vest the power of determining the extent of the federal limitations in the national legislature, was upheld in the most determined manner by such men as Madison, Jefferson (who first proposed it), Randolph and Pinckney. Their support of this proposition shows that they

<sup>1</sup> V. Elliot's Debates, 168.

<sup>2</sup> V. Elliot's Debates, 128.

considered the legislative power to be the natural judge of questions of this character.

This proposal, in one form or another, was brought up again and again, thoroughly debated and finally rejected, not because of any inherent, wrong principle which it contained, but because it was deemed inexpedient to adopt it, owing to the procedural difficulty of applying it. Mr. Lansing, objecting, said: "It is proposed that the general legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will, on the most moderate calculation, be as many acts sent up from the states as there are days in the year."<sup>1</sup> Mr. Dickinson favored an absolute negative in the national legislature. He said: "We must take our choice of two things. We must either subject the states to the danger of being injured by that of the national government, or the latter to the danger of being injured by that of the states. He thought the danger greater from the states. To leave the matter doubtful would be opening another spring of discord, and he was for shutting as many of them as possible."<sup>2</sup> He did not seem to conceive that the judiciary could fill this need. It is true in some places we find vague references to the power of the judiciary to judge of the laws, but it is impossible to believe that, at this time, the framers of the Constitution had fully conceived the feasibility of vesting such powers in the judiciary, or they would not have considered that a like power should be given to the national legislature.

The observations last referred to were made on June 8, 1787, before the convention had more than begun its labors. As the discussion went on, the convention leaned more and more toward a plan to give over the whole matter to the courts. They were inclined to this course for two reasons: First, because of procedural difficulties as we have seen; and, secondly, because the judiciary was recognized to be more conservative and, therefore, less liable to radical action. On July 17th, the clause granting a legislative negative was lost

<sup>1</sup> V. Elliot's Debates, 215.

<sup>2</sup> V. Elliot's Debates, 173.

by a vote of three for and seven against. Mr. Madison favored it still because he thought nothing less would control the states.<sup>1</sup> Mr. Morris and Mr. Sherman favored giving the matter over to the courts.<sup>2</sup>

Immediately after the motion was lost, Mr. Martin, who had been one of its active opponents, moved a resolution,<sup>3</sup> which vested in the judiciaries of the several states the authority to decide between the acts of the national and of the state governments. This motion was agreed to without dissent. The convention apparently receiving it as a substitution for the motion just lost. Mr. Brinton Coxe observes, "In finally rejecting the legislative negative, and overruling its previous action, the convention took a step backwards only to make a leap forwards. Luther Martin's motion in favor of the plan of what is now paragraph 2, Article VI, was, as before stated, immediately offered and adopted without opposition, and apparently without debate. Such action is incomprehensible, if the framers intended to abandon what had been their avowed object, as well as to abandon the measure by which they had intended previously to secure that object. In first adopting and then discarding a legislative negative to be applied with legislative discrimination, and substituting therefor a judicial discrimination applying a general clause of derogation, they intended only to change the means of accomplishing their object, and not to abandon that object itself."<sup>4</sup> If Mr. Coxe's reasoning be sound, we must conclude that the framers of the Constitution, having first recognized as a legislative function the power to judge as to the constitutionality of laws passed by the state legislatures, which it was proposed to vest in the national legislature, then concluded to accomplish the same end by delegating this power to the courts. This delegation, of course, could not change the nature of the power.

The legislative negative, however, was not yet entirely killed. It came up twice more and was finally disposed of

<sup>1</sup> V. Elliot's Debates, 321-2.

<sup>2</sup> V. Elliot's Debates, 321-2.

<sup>3</sup> V. Elliot's Debates, 321-2.

<sup>4</sup> Judicial Power and Unconstitutional Legislation, p. 333.

only on September 15th. On that day the committee laid before the convention a substitute for Article I, Section 10, which, after providing that no state should lay any imposts or duties on imports, etc., etc., without the consent of Congress, concluded: "and all such laws shall be subject to the revision and control of Congress."<sup>1</sup> This was a last attempt to give to Congress precisely the power which the courts of the several states and of the United States now exercise. The motion was lost by a vote of seven to three.

This discussion of the legislative negative is here given to show that, at first, the men who composed the convention thought only of giving the discriminating power to a legislative body. That they abandoned the means on account of procedural difficulties, mainly, and, keeping the same object before them, delegated this power to the judiciary. The avowed purpose of thus depriving the state legislatures of the interpretation of their own laws, was to limit their power still further than could be done merely by constitutional restrictions, the extent of which they had the power to judge. As this power was taken from a legislative body, it must have been a legislative power. Giving it to the judiciary did not make it a judicial power.

This was, perhaps, the critical point in the history of this important question, when the eminent founders of our Constitution, though recognizing the character of the power with which they were dealing, by a wise and provident policy, took it away from the legislative department of government and gave it to another department of co-ordinate authority, thus permitting the one to be a check upon the other, constituting the judiciary the perpetual safeguard of the liberties of the people, protecting them against arbitrary usurpation of power by the legislature.

There is little reason to doubt that, had the legislative negative become a part of our Constitution, the power of authoritative interpretation of its own laws would have been given to Congress, as a necessary adjunct of legislative power; and

<sup>1</sup> V. Elliot's Debates, 548.

would have been left in the state legislatures where it already was, by virtue of the inherent sovereignty of the state. But, having once decided that the judiciary could be entrusted with so great a power to revise and check the acts of the legislature, the conclusion was natural and logical, that it should be given that power in all cases.

One other proposition should be discussed before we take up the question of the actual delegation of this power, and that is the effort to establish a revisory council, composed of executive and judges, who should pass upon the constitutionality of proposed laws. The measure was moved by Mr. Madison. It provided that "every bill which shall have passed the two houses, shall, before it becomes a law, be severally presented to the President of the United States, and to the judges of the Supreme Court, for the revision of each." It also made provision for passage, in spite of disapproval, by certain specified majorities.

We wish, particularly, to call attention to the argument of Mr. Mercer, who "heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is, that legislative usurpation and oppression may be obviated. *He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.*"<sup>1</sup> Mr. Morris favored the motion. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer, as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time, at a loss what expedient to substitute. The justiciar of Arragon, he observed, became by degree the law-giver."<sup>2</sup>

The remarks of these members lead us irresistibly to the conclusion that they both considered that this power, about to be given to the courts, was a legislative power, and that they, for that reason, disapproved of it. It is clear that the

<sup>1</sup> V. Elliot's Debates, 429.

<sup>2</sup> V. Elliot's Debates, 429.

idea was one comparatively new, and the members had not yet concluded that it was a wise step. Mr. Madison favored giving to the judiciary this power, but put his opinion on the ground of utility, without replying to Mr. Mercer's suggestion that they ought not to have the power for *a priori* reasons. Indeed, it must be conceded that Mr. Mercer's suggestion that laws should "be well and cautiously made," with advice by judges, and then be uncontrollable, is one eminently reasonable and extremely difficult to answer. It would, at least, have the merit of precluding the possibility of cases similar to *Gelpcke v. Dubuque* ever arising.

However, the motion to provide a revisory council of judges to examine laws before their passage, was lost,<sup>1</sup> and thus it seemed, at last, to be definitely settled that the interpretation of the laws should be given to the courts.

(c) THE CLAUSE OR CLAUSES IN THE CONSTITUTION, BY VIRTUE OF WHICH THE COURTS OBTAINED THE POWER TO PASS UPON THE VALIDITY OF LEGISLATIVE ACTS.

The importance of this question, as a means of determining the opinions of the framers of the Constitution, cannot be overestimated. If the power was not directly conferred by the Constitution upon the courts, this would be competent evidence that the framers were of the opinion that no such express delegation was necessary; but that the courts already possessed the power, as a strictly judicial function. We do not find it necessary to enter into the discussion, whether this power was expressly given or not, in view of the very able and exhaustive book upon the subject which has decided the question for us. Mr. Brinton Coxe, after a most searching analysis of the Constitution and the opinions of its founders, has come to the conclusion that the framers did intend, and did actually confer, express authority upon the courts to declare laws invalid.<sup>2</sup>

The clauses which confer this power are two in number. Paragraph 2, Article VI, which lays upon the state courts the

<sup>1</sup> V. Elliot's Debates, 429.

<sup>2</sup> See "Judicial Power and Unconstitutional Legislation."



duty to decide between national and state laws, and Section 2, Article III, which extends the judicial power to all cases arising under the Constitution of the United States. Mr. Coxe observes "From this and the preceding chapter, it appears that paragraph 2, VI, and the beginning of section 2, III, have a common origin. This fact is of much importance in any commentary upon the Constitution. It is especially important in this essay, which makes the following contentions concerning those constitutional texts :

(1) In part IV of the Historical Commentary, it is contended that the evidence makes it clear that the two texts were closely connected in the framing thereof, and that the framers intentionally framed them, so as to be adapted to each other.

(2) In the Textual Commentary, it is contended that, independent of the extra-textual evidence, the two texts can be shown to be so intimately related, that they are twin texts."<sup>1</sup>

As we have seen, paragraph 2 of Article VI was adopted without dissent, immediately after the defeat of the legislative negative, and as Mr. Coxe declares, as a substitute therefor. The clause giving to the judiciary power to decide all cases arising under the Constitution of the Union, *was not adopted nor even proposed until August 27th, after it had become evident to the members of the convention that no other practicable plan could be adopted for enforcing obedience to the Constitution.*

On that day Dr. Johnson moved to insert the words "this Constitution and the" before the word "laws," in the clause which is now Article III, Section 2.<sup>2</sup>

That this vested a great and unusual power in the courts, was realized. "Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department." No one remarking upon this point, the motion was passed without dissent, to

<sup>1</sup> P. 292.

<sup>2</sup> V. Elliot's Debates, 483.

make the alteration proposed, the reporter observing that it was understood by the members that the jurisdiction of the courts was limited to cases of a judiciary nature.

In this manner was granted to the courts a power never before, in the history of the world, granted to a judicial body.

Mr. Madison was still not satisfied as to his point, and moved "to strike out the beginning of the third section, 'The jurisdiction of the Supreme Court,' and to insert the words 'the judicial power,'"<sup>1</sup> which was agreed to.

The convention apparently realized that they had given to the courts a power which might be exercised in cases "not of a judiciary nature," and Mr. Madison was anxious that it should be limited to cases of that nature. This was the purpose of his last motion. The tables were now turned. The convention had been considering a means of checking the legislature. They decided to give a part of the legislative prerogative to the courts. Fears now arose whether they had not gone too far in giving to the courts the right to expound the Constitution in all cases. It was then suggested that the courts should only use this power in cases "of a judiciary nature." If the courts had no powers given them except those usually appertaining to courts, it would of course be an absurdity to speak of limiting their action to cases of a "judiciary nature." It is clear from Mr. Madison's remark and the assent of the Assembly to it, that they fully realized that they had given to the judicial department a power, which might be used not only outside of the usual field of judicial action, but also outside of the field in which the framers intended it to be exercised.

For this reason, they took additional precautions that the courts might not unduly encroach upon the legislature by refusing to sanction laws which they might think to be improper. That their fears were not groundless, is seen from an examination of an ever-increasing multitude of cases in the state courts, where these "judicial bodies" have even gone so far as to declare laws void, because they are opposed

<sup>1</sup> V. Elliot's Debates, 483.

to the "inalienable rights" which belong to every citizen.<sup>1</sup> The evident meaning of the framers was that this quasi-legislative power should not be exercised, except where there was a clear conflict between the Constitution and the law.

(3) THE MANNER IN WHICH THE EXERCISE OF THE POWER WAS RECEIVED BY THE COUNTRY.

Before finally leaving this branch of the subject, it may not be out of place to see how the exercise of this power was viewed in cases in which it was first actually applied. We cannot better summarize the matter than by a quotation from the address of Mr. Battle, delivered before the Supreme Court Bench and Bar of North Carolina. He says, "These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island, the claim of being the first in the United States to decide that the courts have the power and duty to declare an act of the legislature, which, in their opinion, is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the judges who had the courage to declare it, were fiercely denounced as usurpers of power. Speight, afterwards governor, voiced a common notion, when he declared that 'the state was subject to three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman Triumvirate, and equally insufferable.' In Rhode Island the legislature refused to re-elect judges who decided an act, contrary to their charter, to be null and void. In Ohio, in 1807, judges who had made a similar decision were impeached, and a majority, but not two-thirds, voted to convict them. . . . New York follows with a similar decision in 1791. South Carolina in 1792. Maryland in 1802. The Supreme Court of the United States in *Marbury v. Madison* in 1801."<sup>2</sup>

<sup>1</sup> See *Godcharles v. Wigeman*, 113 Pa. 431; *State v. Goodwill*, 33 W. Va. 179; *Re Jacobs*, 98 N. Y. 98.

<sup>2</sup> 103 N. C., 472-3.

Although in a few isolated cases these powers had been exercised by state courts before the Revolution, that they could not *legitimately* be exercised without express power given by the Constitution, seems to be clear. This was the cause of the fierce assault which was made upon those judges, who dared to assume this function prior to, or immediately following, the adoption of the Constitution. The objections were put upon the ground that the function was a legislative one. The power was defended, not on the theory that it was one naturally belonging to the judiciary, so much as that there was in America no other body competent or appropriate to discharge this duty.

After the adoption of the Constitution this power was recognized by its defenders to be one, not inherently belonging to the courts, but a "legislative judicial power" granted to them by the Constitution. Chief Justice Marshall, whose opinion in *Marbury v. Madison* is most often quoted to show that he considered this to be a judicial function, said, while arguing the case of *Ware v. Knowlton*,<sup>1</sup> "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; *and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution.*"

As Mr. Marshall was one of the most prominent of those men who conferred this power, he above all others should have known its nature. His decision in *Marbury v. Madison* does not contradict this view. He recognized the undoubted right of the court to decide between the law and the Constitution, because he believed that power to have been conferred. He says "The judicial power of the United States is extended to all cases arising under the Constitution.

"Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

<sup>1</sup> 3 Dall. 199-211.

“ This is too extravagant to be maintained.”<sup>1</sup>

Mr. McMurtrie held the same view as Mr. Marshall as to the original nature of the power, but he differed with him as to whether it had been properly conferred. He says in his observations: “ Let me ask whence is derived this power that we are now discussing, that of declaring void a legislative act? Was such a political power ever heard of before? Did any state ever grant to its judicial functionaries the power of declaring and enforcing the limits of its own sovereignty? What state before conferred on a court of justice, in determining the rights of two suitors, as a mere incident, and without a hearing on behalf of the state, the power to determine that its legislative acts, approved and sanctioned by all its statesmen for thirty years, had always been mere nullities—nullities *ab initio*? ”<sup>2</sup> Mr. McMurtrie, however, finally admits that such a power was granted, though he thinks improperly.

In the course of a debate in the Senate on the Judiciary System, in the year 1802, Mr. Breckenridge gave expression to his opinion that the power given to the courts was a legislative power, and disapproved of it for that reason. He said:<sup>3</sup> “ To make the Constitution a practical system, the power of the courts to annul the laws of Congress cannot possibly exist. My idea of the subject, in a few words, is that the Constitution intended a separation only of the powers vested in the three great departments, giving to each the exclusive authority of acting on the subjects committed to each: That each are intended to revolve within the sphere of their own orbits, are responsible for their own motion only; and are not to direct or control the course of others. That those, for example, who make the laws, are presumed to have an equal attachment to, and interest in, the Constitution are equally bound by oath to support it, and have an equal right to give a construction to it. That the construction of one department of the powers particularly

<sup>1</sup> 1 Cr. 178–9.

<sup>2</sup> P. 13, 14, 15, cited in Coxe on Judicial Power and Unconstitutional Legislation.

<sup>3</sup> IV. Elliot's Debates, 444.

vested in that department, is of as high authority, at least, as the construction given to it by any other department; that is, it is in fact more competent to that department, to which powers are exclusively confided, to decide upon the proper exercise of those powers, than any other department to which such powers are not entrusted, and who are not consequently under such high and responsible obligations for their constitutional exercise; and that, therefore, the legislature would have an equal right to annul the decisions of the courts, founded on their construction of the Constitution, as the courts would have to annul the acts of the legislature, founded on their construction.

"Although, therefore, the courts may take upon them to give decisions which go to impeach the constitutionality of a law, and which for a time may obstruct its operation, yet I contend that such a law is not the less obligatory, because the organ through which it is to be executed has refused its aid."

This quotation well expresses the views of those who oppose this system of interpreting laws proposed by the Constitution. Mr. Hamilton, in defence, thus replies to this view in the *Federalist*:<sup>1</sup> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be recollected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents."

In other words, Mr. Hamilton does not deny the nature of the power, but declares that in a government where the legislative power is limited, it *must be* that the power to judge of their own laws shall be taken away from them, otherwise they would not be limited. While this is not strictly true (a constitution operating only on the conscience of the legislature,

<sup>1</sup> LXXVIII, p. 426.

being a very powerful check), yet the founders of the Constitution deemed it necessary for their security, that this should be done. With this thought in mind they cast about for a co-ordinate department in which to deposit the legislative power which they were withholding from the legislative department, and naturally decided upon the judiciary, which, as is easily seen, is peculiarly well fitted for such a task. This is the thought expressed by Hamilton when he says, "The interpretation of the laws is the proper and peculiar province of the courts."

We conclude, after this cursory examination of the debates and writings of the men who are responsible for our Constitution.

(1) *They recognized that the power to interpret authoritatively the laws passed by the legislature was a power naturally belonging to that body.*

(2) *They desired to withhold that power from the legislature in order to further limit that department.*

(3) *They finally made provision for this power to be vested in the judiciary, because that department was deemed best fitted to carry out this purpose.*

We close the discussion by remarking, once more, that as the power is in its nature a legislative power, it is not changed because it is exercised through the medium of the judiciary.

### *C. Concluding observations.*

We now approach the end of the discussion of the principle involved in *Gelpcke v. Dubuque*. As we have previously pointed out, the case rests upon the theory that the function of state courts when declaring legislative acts void, is of a legislative character. This section has been devoted to an investigation of the soundness of that theory. We have shown

(1) *That in all nations except the United States the power to interpret their own laws actually belongs to the legislative department.*

(2) *That the power granted to the courts by the federal Con-*



*stitution was recognized, by its framers, to be a legislative-judicial power.*

In considering the second point, we have discussed more particularly the federal courts. The same reasoning, however, will apply to the state courts, even more forcibly. First, because state constitutions are modelled after the federal Constitution, and, secondly, because the state governments are inherent sovereignties.

When we conclude that the function of declaring acts invalid is a legislative function, we do not mean to say that it is not performed in a judicial manner. From its very nature, it must be. In countries where the legislature possesses the power to interpret its own laws, it always calls in the aid of judges to assist it in determining between the law and the constitution. Nor would we wish to have it supposed that we are not in favor of that wise and far-seeing policy, which gave this important power to a functionary so able to exercise it.

But, at the same time, we insist that this power should be recognized in its true character. The fundamental difference between our government and the governments of all other countries, is that their constitutions are binding only on the consciences of their legislative bodies. The framers of our Constitution had learned by experience to fear a legislature limited only by its own judgment as to its powers. This was the moving cause of the constitutional provision.

Recognizing, therefore, the power to be legislative, on principle, its exercise should be given the effect of a legislative enactment. And this is precisely what the courts have done ever since the first case arose, where rights depended upon the view taken of the nature of this power. All through the cases we find the expression continually repeated, "a change of judicial interpretation should be given the same effect as a legislative amendment." It has been consistently asserted that a "state can impair the obligation of contracts, no more by decisions of its courts, than by legislative acts." Thus continually recognizing, without actually saying it, that the two stand, in this regard, upon an equal footing. The courts

have reached this conclusion because they realize that any other course would be most unjust to the individual, and most dangerous in its influence upon the state. But that they have not fully accepted the court's action to be legislative in its *intrinsic character*, is inferrible from their action in refusing writs of error to state courts.

The application to *Gelpcke v. Dubuque* is plain. The later decision of the Iowa court declaring the act invalid, was of course an exercise of the legislative prerogative of the Supreme Court of a state. It was, therefore, exactly in the position of a repealing act, and if given retroactive effect, it would impair the obligation of contracts entered into before its enactment.

The Circuit Court did so apply it. The Circuit Court, therefore, gave it such an effect that it did impair the obligation of contracts. Therefore the Supreme Court very properly said, "This amendment to the law, promulgated by the State of Iowa, you have so applied to a contract, as to impair its obligation. Therefore we will reverse you. This amendment is valid as to the future, but cannot affect vested rights which are protected by the federal Constitution."

Our final conclusion is that *Gelpcke v. Dubuque* is sound, not only because the peculiar rule as there laid down has never been contradicted by any court or by any principle of law applicable to it, but because, starting from *a priori* grounds, we arrive on principle at the same conclusion.

We cannot close the subject, however, without devoting a closing section to a discussion of the anomalous position of the Supreme Court, in refusing to allow writs of error to state courts in cases similar to *Gelpcke v. Dubuque*.

*Thomas Raeburn White.*

(To be continued.)

## A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART IV.

Weak and inconclusive as are the arguments of Mr. Pomeroy as to National Sovereignty immediately after the Declaration of Independence, it will not do to assume that in disposing of them, the whole question is settled. Many able and distinguished thinkers have held the same view as to the main point, viz., that the several states were never individually sovereign and independent. That the Declaration of Independence was the Act of Congress—the joint representative of them all—that the confederation conferred all really sovereign powers upon Congress and was designed to be perpetual.

But this view is irreconcilable—let it be said with all respect—with the facts of history. We may grant that the states each recognized the unwisdom of attempting to act singly in relation to many things. That they possessed many interests in common, and that they committed to a general council called “Congress” the management of those joint interests within certain limits. All this does not at all affect the individual independence of the state any more than would a close alliance with similar provisions between France, Russia and Austria. The plain words of the declaration are “free and independent *states*,” not “*a* free and independent state.” And language could not be plainer than that of the articles of confederation.

The men who prepared and adopted the Declaration of Independence, who prepared and adopted the articles of confederation, were fully acquainted with the English language. Their various “addresses” to the King, etc., their statements of grievances, are many of them really examples of style and diction; they are admirably clear, and the words are always well chosen. It is, therefore, a most unmerited aspersion upon their intelligence and learning, and, indeed, upon their candor, to say that their meaning was very nearly the opposite of the natural meaning of their words. There is a

class of minds to which no argument is sound that is not subtle; to which, whatever else words may mean, they never have their plain and obvious meaning. To such I do not expect the evidence to be found within the "four corners of the declaration" and of the "articles" to be convincing. But it can do no harm, it can only do good, for us at this late day to face the facts as they really were, and I propose to devote a little more space to a demonstration of the fact that in the declaration and in the articles our forefathers meant what they said; that they knew perfectly well what they were about; and that, although now, so many years afterwards, we can plainly see that the trend was inevitably toward practical unification, this was not the prevailing thought at the time, and many steps were taken with great deliberation which had no such object in view. Mr. John Fiske has given us in the chapter entitled "The Thirteen Commonwealths," in this "Critical Period of American History," a really admirable sketch of the character and state of those commonwealths at the time of the revolution. He calls attention to many important points with regard to them. In the first article of this series it was mentioned that the colonies were of three kinds—Provincial, Proprietary and Charter—and that their differences in this and other respects must be borne in mind in studying their subsequent constitutional history. Without repeating what Mr. Fiske has said, I shall follow him very largely in pointing out what seems important to the present inquiry. To begin with, the provincial colonies numbered eight: New Hampshire, Massachusetts, New York, New Jersey, Virginia, North Carolina, South Carolina and Georgia. The proprietary colonies were three: Pennsylvania, Delaware and Maryland.

The charter colonies were two: Connecticut and Rhode Island. The government in the provincial colonies was by a Governor—a Viceroy—appointed by the King. In the proprietary colonies, the proprietors acted as governors themselves, or appointed the governors. These colonies "presented the appearance of limited hereditary monarchies," says Mr. Fiske.

In the charter colonies the people elected the governors, and in all the colonies of whatever description, the people elected the legislatures. The history of colonial times is full of accounts of controversies between the legislature and the governors, the representatives of central authority, and these unhappy but inevitable differences were a constant and never ceasing source of irritation, filling the people with an intense desire to have absolute control of their own affairs.

It is difficult to appreciate another most important fact: That the aggregate extent of the thirteen states at the time of the revolution was, practically speaking, far greater than that of the entire country to-day. The comparative sparseness of the population, the extreme difficulty of intercommunication, owing to the bad roads and primitive methods, made Boston and New York further apart than Boston and San Francisco are to-day. Travelling was not only slow but most uncomfortable, and rarely undertaken except from necessity. Rates of postage were high, the mails infrequent and irregular. People often lived and died without crossing the boundary of their own colony. There were great differences also in the degree of civilization of the colonies and the habits, lives and ideas of the people. The backwoodsmen of North Carolina and Georgia were unlike the cultured New Englander or the solidly respectable and well-to-do Quaker, or the courtly cavalier of Virginia. And there was a great difference in thought and general mode of life between the Southern planter and the active energetic business man of New England. On the other hand, all the governments were of English model. Most of the inhabitants were of English descent—the Scotch-Irish element having for ancestors men who, while not English, had long since imbibed the English governmental ideas. Now, having with all their differences, very wide as we have just seen them to be, a common appreciation of the rights of self-government, etc., and a common determination to insist upon those rights, they meet by representatives in a general Congress, when these rights are seriously threatened, to devise means to maintain and preserve them to *each colony severally*. For, of course, Pennsylvania

did not feel that the closing of Boston was a direct injury to her, but simply that if the Crown of Great Britain could so treat one colony it could so treat each in turn.

Reluctantly, and after many times "swearing they would ne'er consent," they "consented," through force of circumstances, to sever all political connection between them and Great Britain, and proceeded, upon the recommendation of Congress, to adopt, each of them, Rhode Island excepted, such form of government as would best conduce to the welfare of their inhabitants. Now let us see, so far as it concerns our present inquiry, what form of government or constitution was adopted by each of them, and when. For convenience they will be considered alphabetically.

CONNECTICUT.—As Fiske rightly remarks, Connecticut and Rhode Island were true republics already and did not modify their general governments, but the action of Connecticut is very significant. In 1776, after the "Declaration," she adopted a short constitution with a preamble, of which the following is the first paragraph: "The people of this state being, by the Providence of God, free and independent, have the sole and exclusive right of governing themselves as a free, sovereign and independent state;" and the first article of the constitution, after adopting the charter of King Charles as the best constitution, "under the sole authority of the people," proceeds: "And that this Republic is, and shall forever be and remain, a free, sovereign and independent state, by the name of the STATE OF CONNECTICUT (capitals in the original)." Further, by Article 3, it guarantees to the "free inhabitants of this or any other of the United States of *America*, and foreigners in amity with this state, the equal protection of the laws."

DELAWARE.—In September, 1777, Delaware adopted a constitution which contains but little that is significant. By Article 16 the "general and field officers and all other officers of the army and navy of this state" are to be appointed by the General Assembly. By Article 22 every person chosen a member of either house is required to take an oath to "bear true allegiance to the Delaware State," etc.

GEORGIA.—In the spring of 1777, Georgia, in express pursuance of the recommendation of Congress, adopted a constitution, the preamble of which, after reciting that the oppressive conduct of Great Britain had “obliged the Americans as freemen . . . to assert the rights and privileges they are entitled to by the laws of nature and reason; and, accordingly, it hath been done by the general consent of all the people of the States of New Hampshire,” etc., “given by their representatives met together in general Congress in the City of Philadelphia” goes on to say that “the following rules and regulations” shall be adopted.

This preamble is, of course, much pleasanter reading for Mr. Pomeroy than is that of Connecticut, but by Article XIV of the Constitution every person entitled to vote, shall, if required, take this oath :

“I, A. B., do voluntarily swear (or affirm as the case may be) that *I do owe true allegiance* (italics mine) to this state, and will support the constitution thereof.” And the governor-elect is required to swear, *inter alia*, to “support, maintain, and defend the State of Georgia, and the constitution of the same.”

MARYLAND.—In the fall of 1776, a constitution was adopted in Maryland consisting of a declaration of rights and a form of government. The preamble recites that Great Britain has “at length constrained them (the United Colonies) to declare themselves free and independent states.” Nothing is said directly, as to Maryland being “sovereign,” etc. But in the prescribed form of oath to be taken by officers, they are required to expressly renounce allegiance to the King, and promise “true allegiance” to the state.

MASSACHUSETTS.—The constitution of Massachusetts, adopted in 1780, consists of two parts—a declaration of rights and a form of government. The preamble says that “the following” is to be the constitution of the “Commonwealth of Massachusetts.” In the declaration of rights it is laid down, that “the people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent state, and do and forever shall exercise and



enjoy every power, jurisdiction and right, which is not or may not hereafter be 'vested' by those expressly delegated to the United States in Congress assembled." The governor for the time being is to be commander-in-chief of the army and navy, with full power to train them, etc., and to use them when necessary. The prescribed oath for officers obliges them to expressly declare the sovereignty and independence of the state, and to promise it true faith and allegiance—also to renounce allegiance to the King, and that "no person, prelate, state, or potentate hath or ought to have any jurisdiction," etc., within this Commonwealth, "except the authority which is or may be vested by their constituents in the Congress of the United States."

NEW HAMPSHIRE.—After several vain attempts, New Hampshire finally adopted a constitution in 1784. It is in two parts. Part I being the bill of rights, and Part II the form of government. Article VII of the "bill of rights" is as follows: "The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled." In asserting that all its inhabitants are entitled to various rights, the expression is, "Every *subject* of this state," etc. Part II begins as follows: "THE people inhabiting the territory formerly called the Province of New Hampshire, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign and independent body-politic, or state, by the name of the STATE OF NEW HAMPSHIRE." After providing for the office of president, the duties of that officer are set forth, and among them is that of commander-in-chief of the army and navy, and the leadership of them as occasion may require against the internal or external enemies of the state. The president and certain other officers are required to take oath, *inter alia*, that the state is, and of right ought to be free, sovereign and independent, and to "bear faith and true allegiance to the

same." The close similarity between the constitution of Massachusetts will be at once noticed—the constitution of New Hampshire, however, never speaks of rights and powers "*vested*" in Congress.

NEW JERSEY.—The constitution of New Jersey made pursuant to the recommendation of Congress that each colony should adopt a suitable form of government, was prepared before the declaration of independence, and its publication ordered the day before—July 3, 1776. It speaks of Congress as the "Supreme Council of the American Colonies"—speaks of New Jersey as a "colony," and provides that in the event of a reconciliation between the colonies and Great Britain, it shall be void.

NEW YORK.—After reciting in a long preamble the wrongful acts of Great Britain, the resolutions of Congress, and the Declaration of Independence in full, the constitution of New York (1777) proceeds to lay down a form of government. New York is spoken of as a "state," and among the duties of the governor is that of acting as commander-in-chief of the "militia and navy," in the very last article it is provided that aliens who wish to become citizens "shall take an oath of allegiance to this state," etc.

NORTH CAROLINA.—In the winter of 1776, North Carolina adopted a constitution beginning with a declaration of rights, in which it is asserted that the people of the state ought to have the sole and exclusive right of "regulating the internal government and police thereof." The preamble recites the fact of separation from Great Britain, and the Declaration of Independence. It is provided in the constitution proper, that aliens coming "to settle in this state, having first taken an oath of allegiance to the same" shall have certain rights. In the "Mecklenburg Declaration" of 1775, the North Carolinians declared themselves a "free and independent people;" . . . "under the control of no power, other than that of our God and the general government of the Congress."

PENNSYLVANIA.—The constitution, adopted in the summer of 1776, begins with "a declaration of the rights of the inhabitants of the State of Pennsylvania." In the third article

of the declaration it is said that "The people of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same." Pennsylvania is spoken of indifferently as a "commonwealth" or "state"—in fact, in the first section of the plan or frame of government, the expression is "The Commonwealth or State of Pennsylvania," etc. An "oath of allegiance" by officers is to be provided for; but the words of the oath are simply a promise to be "true and faithful" to the Commonwealth. And it is provided still later that aliens having first taken an oath of allegiance to the state, may hold lands, etc.

RHODE ISLAND.—Alone, of all the states, Rhode Island failed to adopt a new constitution, and continued under her charter—a very satisfactory republican form of government.

SOUTH CAROLINA.—In the spring of 1776, South Carolina adopted a constitution, declared in the preamble of the constitution of 1778 as intended to be "temporary only." The preamble is a recital of grievances against Great Britain, and of the consequent necessity of a form of government for the colony. This form is thus provided for, and the "army" and "navy" are spoken of. In 1778, a constitution was adopted, of which the preamble recites, *inter alia*, that the "United Colonies of America have since been constituted independent states." The first article ordains that "the style of this country be hereafter the State of South Carolina." The thirtieth article mentions the "army and navy of this state;" and the thirty-third article denies to the governor the "power to commence war or conclude peace, or enter into any final treaty" without the consent of the Senate and House. The thirty-fifth article empowers the governor, in recess, with the advice of the privy council, to "lay embargoes or prohibit the exportation of any commodity" for thirty days. By Article XXXVI, officers are required to expressly acknowledge South Carolina to be a free, sovereign and independent state, and that the people thereof owe no allegiance to the King.

VIRGINIA.—In a convention of members of the House of Burgesses, which met May 6, 1776, a declaration of rights was adopted, in which the general doctrine that all power is

derived from the people is set forth, together with many other familiar principles. Section XIV seems to me the only one of much significance: "That the people have a right to uniform government; and, therefore, that no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof." This declaration was adopted June 12, 1776. On June 29th the same convention adopted a constitution which is merely a form of government, and which, oddly enough, contains nothing worthy of note in the present inquiry. It is declared to a "form of government of Virginia." On May 15th the convention had resolved to instruct the Virginia delegates to Congress to propose to that body "to declare the united colonies free and independent states." And to give the assent of Virginia to all measures thought wise by Congress as to foreign alliances and a confederation of the colonies. "Provided, that the power of forming government for, and the regulation of the internal concerns of each colony be left to the respective colonial legislatures."

Is there anything to be found in these twelve constitutions, to warrant the assertion that the states were united in a national capacity when they were formed, or to lead one to suppose that the Articles of Confederation, adopted after some of them, and before others, was intended so to unite them?

Three of them call themselves "sovereign states," one—Connecticut—calling herself a "republic." South Carolina calls herself a "country." Almost without exception they require an oath of allegiance on the part of their civil officers. Almost without exception they speak of the "army and navy" of the state, and there is not one line in any of them which would indicate that the confederation was considered to be anything but a "firm league of friendship." And what more natural? Their differences in population, their remoteness from each other, their recent bitter experience with a central power, all made it an impossibility that they should at once give up their separate independence and become politically one. Congress had not increased in respectability, as Mr. Fiske puts it, but like most bodies without real authority, was

not very much thought of, and its behests were heeded only when it pleased the particular state to heed them.

There are, of course, numerous expressions of individuals—Washington, Madison, and others—showing a belief in the essential oneness of the continent, and that this had been accomplished by the confederation. But from what has been said it must be evident, as it seems to me, that such is not the historical fact. Certain powers usually exercised by the sovereign were delegated to Congress by the states. Certain others were retained by them. And it is quite evident that these powers conferred upon Congress were considered not as actually parted with by the states, but as delegated to a common agent. The articles provided no executive head, but only a Congress—a “Supreme Council of the States” as the constitution of New Jersey puts it. And the states mutually agreed that this arrangement should be perpetual. They did not agree that this Congress should be a sovereign power, but that through its agency, and only through its agency, certain of their sovereign powers should be exercised. Judge Hare says that the states were sovereign, but not independent. And, of course, any league or alliance to a certain extent takes away from the independence of the contracting parties. A sovereign and independent state is one which is *sui juris*, so to speak, under no tutelage or over lord-ship. It does not seem to me that an alliance or league affects the sovereignty or independence of a state, politically speaking. Of course, the practical effect may be, to very seriously hamper the exercise of a state’s powers. And in such cases confusion and controversy are bound to ensue; and this was the case with the confederation. It was really, as suggested before as a possibility, a political Frankenstein. It was an attempt at the impossible; for no body entrusted with the exercise of such powers as were delegated to Congress, can possibly exercise them unless they are accompanied with commensurate authority. The result in this case was, as Mr. Fiske well says, that the country “had begun to drift toward anarchy even before the close of the Revolutionary War;” and he also even states the then capital defects of the confederation: *First*, The necessity for a two-thirds vote for any important legisla-

tion in Congress ; *Second*, The impossibility of presenting a united front to foreign countries in respect to commerce ; and, *third*, the absence of any power in Congress to enforce obedience. And yet, Mr. Fiske is to be numbered with those who deny that the states ever were sovereign !

The irresistible conclusion from all the known facts, from all the light that history can throw upon the question, seems in my humble judgment to be, that prior to the Declaration of Independence the colonies were neither sovereign nor independent, and did not pretend to be either. The only union between them was an "association" by which they agreed on certain measures of non-intercourse with Great Britain, and a continuously sitting Council or Congress, by which their joint action in armed resistance, etc., was regulated, and whose "recommendations" on other subjects were treated very generally with respect. The Declaration of Independence made them not a free and independent state, but free and independent states, with not even a well-defined league of friendship between them. Realizing the necessity for such a league, but not *as yet* realizing the necessity for true continental nationality, they formed the confederation, and set out in terms so clear that only blindness can mistake them, that they severally proposed to KEEP their sovereignty, but to enter into a firm and perpetual league of friendship, each according to a common agent the actual exercise of some of its sovereign powers. That the arrangement proved to be impracticable,—a source of confusion worse confounded—is one more proof, if any were needed, that there was no real sovereignty in the General Congress. For it shows the utter lack of unification. A detailed recital of the various troubles which beset the states during the confederation, is unnecessary here. Conditions soon became intolerable ; there was commercial warfare between the states, and danger of actual warfare. Congress, as a body, fell into disrepute at home and abroad. Every state was busy looking after its own interests, as it saw them. And of real unitedness, to say nothing of union, there came to be little left but the name. It became evident that some change was necessary. As early as 1781 an amplification of the powers of Congress had been sug-

gested, but nothing came of the suggestion. In 1786, the confederation came near actual dismemberment by *secession*, the immediate cause of the trouble being the difficulties surrounding the question of the navigation of the lower Mississippi. At length, on the 11th of September, 1786, there met at Annapolis commissioners from five states (nine states had appointed commissioners) to discuss some plan for getting rid of the conflicting regulations and restrictions upon commerce. They were too few to feel justified in going on with their work. But they adopted an address by Alexander Hamilton recommending a convention in Philadelphia the following May to "devise such further provisions" as they may think necessary to render the "federal constitution adequate to the exigencies of the Union."

The suggestion was not at once adopted by Congress, or by the states, but at length all but Rhode Island appointed delegates to the proposed convention, which met in Independence Hall on May 14, 1787. How wonderful the work this convention was to do! How different from that which it assembled to do! It convened in response to a suggestion of a pronounced nationalist, Alexander Hamilton. Virginia was the first to elect delegates to it, at the instance of another pronounced nationalist, Madison. And its avowed object was to devise provisions which would render "the Constitution of the federal government adequate to the exigencies of the Union." Yet, even now, there were able and distinguished men who had no sympathy with the movement. There were men in the convention of pronounced "state rights" views, and who would have been glad to see its work a failure. It will not be wasted time to consider the "personnel" of the various delegations, the time at which and the manner in which they were chosen. The delegations from several states were chosen before any action of Congress looking to a convention had been taken, and all had representatives at the opening of the convention, or very shortly thereafter, except Rhode Island, the most persistent disturber of the general peace and harmony, though by no means alone in her guilt.

*Lucius S. Landreth.*

(To be Continued.)



## PROGRESS OF THE LAW.

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AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE  
REPORTS.

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### ACTIONS.

In *Parmenter v. Barstow*, 43 Atl. 1035, the question was presented whether or not, in an action of trespass for personal damages occasioned by negligence, a previous judgment against a joint tortfeasor for the same injury was a bar to the action.

Judgment  
Against Joint  
Tort Feasors,  
Estoppel

In deciding that the previous judgment was not a bar to the action, the Supreme Court of Rhode Island discusses a number of cases which have been decided *contra*: *Broome v. Wootom*, Yel. 67; *Adams v. Broughton*, And. 18; *Buckland v. Johnson*, 15 C. B. 145; *Rex v. Hoare*, 13 M. & W. 495; *Hunt v. Bates*, 7 R. I. 217; *Wilkes v. Jackson*, 2 Hen. & M. 355, and *Petticolas v. Richmond*, 95 Va. 456. The court points out that the English cases and *Hunt v. Bates*, *supra*, could have been decided upon the principle anciently applied, that where property had been taken by a tortfeasor and a judgment in trover recovered against him, the title to the goods vested in the tortfeasor from the date of the conversion, no matter whether the judgment was satisfied or not; therefore no action could be brought against another tortfeasor, since the plaintiff had no interest in the goods from the time of the conversion. Of course such a principle could not possibly be applied to the case of successive actions for personal injuries brought against joint tortfeasors, and so all the American courts have held, except those of Virginia: *Petticolas v. Richmond*, *supra*. See *Lovejoy v. Murray*, 3 Wall. 1; Cooley on Torts, § 137.

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### BILLS AND NOTES.

In Colorado a verbal acceptance of a bill of exchange is binding, even though the drawee has no funds of the drawer in his hands at the time of the acceptance, provided that he afterwards receives such funds. In the present case the acceptor was estopped from denying the receipt of such funds, since, after the acceptance,

Verbal  
Acceptance  
of Bill

BILLS AND NOTES (Continued).

he paid to the drawer, on account of the transaction, a sum greater than the amount of the acceptance: *Durkee v. Coughlin*, 57 Pac. (Col.) 486.

In *Bank v. Ferguson*, 59 N. Y. Suppl. 295, which was an action by an indorsee of a note against his immediate indorser, the defence was that at the time of the indorsement to the holder, plaintiff agreed that, in case of non-payment, he would not sue defendant until he had realized on certain collateral and had exhausted his remedy against the maker, in which case he would merely collect the balance from defendant. The Supreme Court of New York, following the rule in most jurisdictions, held that this was an attempt to vary the terms of a written contract by parol evidence, which could not be done in the case of an indorser's contract any more than any other contract could be varied; therefore the defence was unavailing. Citing *Specht v. Howard*, 16 Wall. 564; *Brown v. Wiley*, 20 How. 442; *Ins. Co. v. Homer*, 9 Metc. 39; *Hoare v. Graham*, 3 Camp. 57; *Free v. Hawkins*, 8 Taunt. 92; *Abrey v. Crux*, L. R. 5 C. P. 37.

*Salomon v. State Bank*, 59 N. Y. Suppl. 407, offers a valuable hint as to a manner in which a number of small suits may be rendered unnecessary. Plaintiff had received twenty-four checks for small amounts, drawn to his order, which were stolen and deposited in the defendant bank, plaintiff's name being forged. Defendant collected the checks and paid the amount to the depositor, and plaintiff brought an action of tort against defendant for the conversion of the checks and recovered their full amount. In this way plaintiff escaped the trouble of bringing twenty-four suits for small amounts against the makers of the checks, many of whom were non-residents, and by sounding his action in tort, he relieved himself from the rules governing actions on negotiable instruments, such as liability to deliver the checks to defendant, subrogation, etc.

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CONSTITUTIONAL LAW.

A statute of Kansas, Gen. Stat. 1897, c. 134, §§ 11, 20, provided that upon the conviction of prisoners between the ages of sixteen and twenty-five and their sentence to terms in the state penitentiary, they should be removed to a state reformatory and detained for the length of their sentence or

Parol  
Evidence  
to Vary  
Obligation of  
Indorser

Conversion  
of Checks by  
Bank

Power to Free  
Convicted  
Prisoners,  
Pardon

## CONSTITUTIONAL LAW (Continued).

released to liberty at the discretion of the managers of the institution. The Supreme Court of Kansas decided (1) that the power given to the managers did not encroach on the power of the legislature to punish for crime, since the legislature fixed the punishment, but merely made it conditional, and (2) that it did not encroach on the governor's pardoning prerogative, because the managers only gave the prisoners their liberty and did not pardon in the legal sense of the word, *i. e.*, remove the existence of their guilt in the eye of the law: *State v. Page*, 57 Pac. 514.

The Supreme Court of Utah has affirmed a conviction for felony, where the trial took place before eight jurors instead of twelve, in accordance with Art. I, § 10, of the new constitution of Utah and Rev. Stat. (1898), § 1295, which provided the procedure for the new form of trial. The constitutional provision was attacked as being in violation of the sixth and fourteenth amendments to the Constitution of the United States, providing, respectively, for the continuance of the jury trial and for the protection of citizens of the United States against deprivation by the states of life and liberty without due process of law. In respect to the fourteenth amendment, the court shows, by a steady line of decisions of the Supreme Court of the United States from *Hurtado v. California*, 110 U. S. 516, to *Hodgson v. Vermont*, 168 U. S. 262, that there is nothing in this amendment which requires that the jury of twelve shall be preserved forever; while, as to the sixth amendment, the court was obliged to repeat the old and well-worn proposition, that the first eight amendments to the Constitution of the United States do not constitute restraints on state action. Although the Supreme Court of the United States has consistently adhered to this doctrine ever since the time of Chief Justice Marshall, yet lawyers never seem to grow tired arguing the question, since, to our knowledge, the point has been raised four times in appellate courts within the last few months: *In Re Maxwell*, 57 Pac. 412.

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 CONTRACTS.

An interesting decision has been rendered in regard to the proper interpretation of the provisions of the California Code in regard to contracts in restraint of trade, which provisions may be regarded as typical of the various codes which are in force, or about to be adopted, in several states.

Restraint of  
Trade, Sale of  
Goodwill by  
Stockholder

CONTRACTS (Continued).

The Civil Code, § 1673, prohibits all contracts in restraint of trade, except as allowed by the next two succeeding sections. § 1674 provides that the vendor of the goodwill of a business may bind himself to refrain from carrying on the business within a specified city or county, so long as the business shall be carried on by the vendee. § 1675 provides that a retiring partner may do the same.

In *Merchants' Avtg. Co. v. Sterling*, 57 Pac. 468, the general manager of a corporation, who was a large stockholder, sold his stock to the plaintiff, stipulating that he would not engage in the business within the county as long as it should be carried on by the plaintiff. In a bill for an injunction to restrain the vendor from breaking the agreement, the question was whether or not the vendor of the stock was a "vendor of the goodwill of the business," within § 1674. It was strongly urged on behalf of the plaintiff that the defendant was such a vendor, because the value of the goodwill of the business entered into and formed an element in the value of the stock; that plaintiff would not have paid so much for his stock if he had not obtained defendant's stipulation to refrain from the business. However, the Supreme Court of California decided that it must adhere to the strict letter of the code; that the goodwill of a corporation is an attribute of the corporation itself, and not of the stock thereof; that only the corporation, and not a stockholder, can be a "vendor of the goodwill" of its business, within § 1674; therefore, even though an enhanced price had been paid for the stock on the strength of the stipulation, yet that defendant could not possibly be a "vendor" within § 1674, but defendant's stipulation not to engage in business was void under § 1673. The decision, while technically correct, is very unfortunate, since it is directly in the teeth of modern tendencies, both legal and economic, which seek to legalize these contracts in partial restraint of trade when they are *bona fide*, founded on a valuable consideration, and are necessary for the legitimate protection of the vendee.

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CORPORATIONS.

In *May v. Genesee County Bank*, 79 N. W. 630, the Supreme Court of Michigan decided that under a statute of that state exempting any but the real owner of stock from assessments on account thereof, a bank which was registered on the books of a corporation as the owner of the stock, might show that it was, in fact, the

## CORPORATIONS (Continued).

pledgee thereof. The facts were that a person gave the stock in question to a bank as collateral security by executing an assignment on the back of the stock certificate. Subsequently the vice-president of the bank requested the corporation to cancel the old certificate and issue a new one in the name of the bank as pledgee. He was informed that it would do as well to have the stock stand simply in the name of the bank without adding the word pledgee, and he consented to have the certificate issued in that form. Subsequently the corporation failed and the receiver sued the bank for the assessment due on the stock held by it. It appeared that the bank in its corporate capacity had never ordered the certificate taken out in its name and proof was offered that the stock had never been held as anything but collateral security for debt. The court held that the bank might show that it was only a pledgee and not liable to the assessment. This interpretation of a statute which provides that a pledgee shall not be liable for assessments, seems to be in accord with the decision of the Supreme Court of the United States in *Burgess v. Seligman*, 107 U. S. 31, and *Pauly v. Trnst Company*, 165 U. S. 606. It seems, however, that where there is no such statute, the person in whose name the stock stands is liable for the assessments: See *Altman's Appeal*, 98 Pa. 505.

The Court of Errors and Appeals of New Jersey has recently rendered an interesting decision on the construction of the New Jersey Act of 1896 (P. L. 1896, p 307, § 97, *et seq.*), which provides that no foreign corporation shall do business in New Jersey until it files a certificate of incorporation with the secretary of state and in other ways complies with the statute. The D. & H. Canal Company, a Pennsylvania corporation, sold coal to a person in New Jersey and obtained a guaranty for the payment of the price from defendant, who resided in Jersey City. In an action on the contract of guaranty, defendant pleaded that plaintiff was attempting to "do business" in New Jersey without having complied with the above statute.

The court decided that the object of the statute was to prevent foreign corporations from transacting a general business, in New Jersey and that it had no application to a single act of business, such as a sale or a contract of guaranty, as in this case, citing with approval *Mfg. Co. v. Ferguson*, 113 U. S. 727; *Thompson, Corp.*, § 7936. As the court said, if this

**CORPORATIONS (Continued).**

single transaction came within the term "doing business" in the above statute, then it would also come within the statute which requires fines, taxes and license fees from foreign corporations "doing business in the state," and it would be unreasonable to subject the corporation to the burden of the statute on account of a single act. Judgment for the plaintiff was therefore affirmed: *D. & H. Canal Co. v. Brock*, 43 Atl. 978.

In the same volume of the reporter there appears a decision of the Supreme Court of Pennsylvania to the same effect, holding that a corporation of Illinois, which sends an agent into Pennsylvania to effect a single sale of a machine, does not violate the Pennsylvania Act of April 22, 1874 (P. L. 108), relative to terms upon which foreign corporations may "do business" in Pennsylvania: *Wolff Dryer Co. v. Bigler*, 43 Atl. 1092.

In *Topeka Capital Co. v. Remington Paper Co.*, 57 Pac. (Kas.) 504, an action was brought against the defendant corporation on a note signed: "The Topeka Capital Company, Dell Keiser, B. Mgr." The defendant's answer set forth the fact that there was no such officer in a corporation as a "business manager" known to the law, and that plaintiff had not averred that any authority had been given to the said business manager to make the note. On demurrer to the answer, the court ordered judgment for defendant on the ground that only the statutory officers of a corporation are presumed to have power to perform corporate acts; that the "business manager" was not such an officer; that, while everyone knows that the business manager of a corporation commonly does have the power to transact such business, yet that the court could not take judicial notice of the fact; and that it was necessary for the plaintiff to aver and prove that power to make the note had been conferred by the directors upon the business manager.

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**DEEDS AND MORTGAGES.**

Where the acknowledgment of a mortgage by a married woman is regular on its face, it requires very strong evidence to establish the fact that it is void. Thus, in *Gray v. Law*, 57 Pac. 435, a suit brought to cancel a mortgage by a married woman on the ground that it had not been acknowledged apart from her husband, plaintiff rested his case on the evidence

**Acknowledg-  
ment,  
Evidence to  
Establish  
Invalidity**

**DEEDS AND MORTGAGES (Continued).**

of the husband and wife, who testified that the wife had signed the acknowledgment in her own house and before her husband, who then took the mortgage to the notary, where the acknowledgment was filled in and completed. However, the testimony of the husband was so very contradictory that it was thrown out altogether, and the Supreme Court of Idaho held that the unsupported testimony of the wife was insufficient to rebut the strong presumption of regularity arising from the face of the acknowledgment.

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**EMINENT DOMAIN.**

It is well settled in New York that when an elevated railroad is constructed along the streets of a city, only those property owners can recover damages whose properties front on the street where the road is located: *Mooney v. R. R.*, 9 N. Y. Suppl. 522. But it will easily be seen that a difficult question arises when a railroad is built in front of a large apartment house which has stores opening upon both the front and rear streets. Is the damage to be confined to that portion of the building which fronts on the road, or is the general damage to the whole building to be taken into consideration? The Supreme Court of New York says that if, as in *Reilly v. Manhattan Rwy. Co.*, 59 N. Y. Suppl. 335, the stores in the rear of the building are separate and distinct from the stores in the front, the damages must be confined to the latter, and evidence of the depreciation in value of the rear stores is inadmissible.

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**EVIDENCE.**

In *Musser v. Stauffer*, 43 Atl. 1018, an action was brought on promissory notes, the defence to which was that the notes were given on the strength of a contemporaneous parol agreement, the performance of which was a condition precedent to the payment of the notes, and which agreement had not been performed by the plaintiff. The notes were made and payable in Virginia. A previous action had been brought on these same notes and carried to the Supreme Court of Pennsylvania (178 Pa. 100), where the case had been decided according to the law of Pennsylvania, in favor of the plaintiff, there being no evidence that the law of Virginia was different.



## EVIDENCE (Continued).

In the present case, at the trial in the court below, counsel furnished decisions of the highest court of Virginia, appearing in the authenticated reports of such decisions, showing that, according to the law of Virginia, a contemporaneous parol agreement afforded no defence to an action on a written contract, and the lower court decided the case in accordance with these decisions, on the familiar principle that the law of the place of performance of a contract governs the performance. On appeal to the Supreme Court it was contended that the law of Virginia on the subject had not been sufficiently proved, but it was held that the reported decisions, being unanswered, constituted a sufficient rebuttal of the presumption that the law of the forum was the same as the law of the contract. This point, although argued by counsel and decided by the court, is not noted in the syllabus of the case in the Atlantic Reporter.

In *Knowlton v. N. Y., N. H. & H. R. Co.*, 44 Atl. (Conn.) 8, Baldwin, J., said, "The Superior Court had the right to take judicial notice of the historic fact that the railroad between New Haven and New York was opened by January 1, 1849. The opening of a new railroad for public use is one of those events of public notoriety which are to be taken as known by the courts, because they are known to everybody. It is a great geographical change, like the bursting out of a new river from the earth, to serve as a highway of commerce in new directions."

## HUSBAND AND WIFE.

Unlike the rule in Maine and a few other jurisdictions, it is settled in New York that a woman who entices a husband away from his wife is liable to an action by the wife: *Bennett v. Bennett*, 116 N. Y. 584; *Jaynes v. Jaynes*, 39 Hun, 40; *Baker v. Baker*, 16 Abb. N. C. 293. The Supreme Court of New York has extended this doctrine a trifle further in *Kuhn v. Hemmann*, 59 N. Y. Suppl. 343, where it was held that the parents of the girl with whom the married man had gone to live must respond in damages to the wife, when it was shown that they had assented to and encouraged the adulterous intercourse between the married man and their daughter, had furnished the pair with money and apartments in which to live, and had been present at a bigamous marriage which took place between

**HUSBAND AND WIFE (Continued).**

their daughter and plaintiff's husband. Van Brunt and Ingraham, JJ., dissented, but the grounds of their dissent are not stated.

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**INJUNCTIONS.**

The Supreme Court of Nebraska in a very unsatisfactory opinion (*Miskell v. Prakup*, 79 N. W. 552) has decided that **Trade-Name**, where a plaintiff has built up a business, which has **Infringement** become well known by the name or designation of the "Racket Store," and the defendant then opens a store close by, which he styles the "New York Racket Store," the words "New York" being printed in very small letters, there has been no infringement of the plaintiff's rights. The evidence in the case tended to show that the use of the word "racket" was very common in the district for the designation of such stores as those of the plaintiff and defendant. The court must have based its decision on this ground alone. It says, "In some cases it has been decided that such designations are but descriptive in their character, and subsequent similar use by a near rival will not be enjoined at the instance of one who had made the prior selection and application." See *Cray v. Koch*, 2 Mich. N. P. 119; *Choynski v. Cohen*, 39 Cal. 501.

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**INSURANCE.**

In *Cummins v. German, etc., Ins. Co.*, 43 Atl. 1016, one of the questions at issue was whether or not the proof of loss **Proof of Loss**, furnished by the insured sufficiently complied with **Sufficiency**, the policy to warrant the bringing of the suit. **Question for Court** The trial judge sent the proof to the jury for their determination of this question.

An appeal by the defendant, the Supreme Court of Pennsylvania decided that the action of the trial judge was error, since the only point at issue was one which could be determined from an examination and comparison of the proof and the policy, and this was clearly a question of law for the court and not one of fact,—following *Ins. Co. v. O'Neill*, 110 Pa. 548; *Cole v. Assurance Co.*, 188 Pa. 345, and *Sutton v. Ins. Co.*, 188 Pa. 380. Judgment for the plaintiff was therefore reversed.

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**MASTER AND SERVANT.**

In *Madara v. Shamokin, etc., Rwy. Co.*, 43 Atl. 995, plaintiff proved that she was a passenger in an electric car of the

**MASTER AND SERVANT (Continued).**

**Presumption of Employment from Acts of Servant** defendant company; that the car became stalled by reason of some defect in the motor; that one V., who was on the car, assisted in attempting to get it started and gave directions to the conductor and motorman; that V., finding his efforts were unavailing, said that he would go back to the car barn and bring out a new car, which he did; and that in negligently operating the new car he ran it into the other one, where plaintiff was sitting, whereby she was injured.

The trial judge refused defendant's request for binding instructions, but left it to the jury to determine whether V. acted as a mere volunteer or whether he acted as an agent of the company by virtue of the authority or instructions of the motorman. On an appeal by defendant, the Supreme Court of Pennsylvania was even more unfavorable to defendant's case than the trial judge, as appears by the following language: "Being injured by one of the carrier's cars while occupying that relation, the presumption is that it was through the negligence of the carrier. The burden is on it to rebut the presumption by showing that V was a mere intruder upon the relieving car, acting wholly without authority. The burden is not upon the passenger to prove that one apparently in authority, having access to the car barn and the power to assume control of a car, and run it on the road to the relief of the stalled car, was a servant of the company. If the accident had apparently been caused by the act of a stranger while the plaintiff was a passenger, as in *Railway Co. v. Gibson*, 96 Pa. 83—a collision with a hay wagon—the burden would have been on her to show negligence on part of defendant. But when it arose from a collision between defendant's cars, operated on its own rails, the presumption of negligence arises, and the burden is on the defendant to rebut it."

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**MECHANICS' LIENS.**

The third clause of the printed contract between the owner and the contractor provided that the owner could require of the contractor sufficient evidence that the premises were free from all liens before payment could be demanded, and that he could retain an amount sufficient to indemnify him against any liens which might be filed without regard to the contract. The tenth clause of the contract, which was written in ink, provided that "no liens shall be filed by any sub-contractors or any other persons for or on account of work, etc."

**Release of Liens, Repugnancy in Contract**

## MECHANICS' LIENS (Continued).

In dismissing the lien filed by the contractor himself, the Supreme Court held (1) that the tenth clause contained all the requirements necessary to bring it within *Schroeder v. Galland*, 134 Pa. 277, and barred the contractor himself from filing a lien, and (2) that if any repugnancy existed between the third and tenth clauses of the contract, the tenth clause must prevail, in accordance with the rule stated in *Grandin v. Insurance Co.*, 107 Pa. 26, that "where the written and printed portions are repugnant to each other, the printed form must yield to the deliberate written intention:" *Comm. Trust Co. v. Ellis*, 43 Atl. 1034.

## NEGLIGENCE.

In *Brague v. North Cent. Rwy.*, 43 Atl. 987, which was an action to recover damages from a railroad company for the death of a child, it was shown that the deceased  
**Trespasser on Railroad, Child, License from Company** was about seven years old; that the railroad had given him permission to get water at a spring belonging to the company, across the track from the place he resided; that he had filled his pail with water and was walking across the track, not at the public crossing a short distance from the spring, but directly from the spring to his house; and that he was struck by an engine and killed while crossing, or walking along the track.

In affirming a judgment for defendant, the Supreme Court of Pennsylvania decided that (1) the license from the company gave the deceased simply the right to take the water from the spring, which could be obtained by crossing the track at the public crossing, and no permission to otherwise trespass on the track could be implied, and (2) the rule that a railroad owes to a trespasser only the duty of abstaining from wanton negligence applies even where the trespasser is a child, as in this case. In support of the last proposition, *R. R. v. Hummell*, 44 Pa. 375, *Moore v. R. R.*, 99 Pa. 301, and *Cauley v. R. R.*, 95 Pa. 398 were cited.

## PERPETUITIES.

Property was devised to A. for life, and after his death to a corporation, which the testator directed his executors to form  
**Devise to Corporation to be Created in futuro** under the laws of New York within the lifetimes of B. and C. The devise being attacked on the ground that the remainder to the corporation violated the rule against perpetuities, it was held,

## PERPETUITIES (Continued).

that the remainder was valid, since it was necessary for the corporation to be formed within lives in being, *i. e.*, the lives of B. and C. The mere fact that there might be a hiatus between the death of A. and the creation of the corporation did not affect the question, since the property would revert to the heirs of the testator, subject to being divested by the creation of the corporation within the lives of B. and C. : *Jessup v. Pringle Memorial Home*, 59 N. Y. Suppl. (Supreme Court), 207.

## PRINCIPAL AND AGENT.

When an agent has been appointed, and subsequently the principal becomes insane, the agency is revoked as regards all persons except those who deal with the agent in ignorance of the insanity of the principal. But when one of these latter persons attempts to hold the principal on a contract made by the agent subsequent to the insanity of the principal, it is well for him to remember that as soon as the insanity of the principal has been proved, a *prima facie* case in favor of the defendant has been made out, and the burden is then on the plaintiff to show that he dealt with the agent in entire ignorance of the fact that the principal was insane : *Merritt v. Merritt*, 59 N. Y. Suppl. 357.

## REAL PROPERTY.

A. and B., adjoining owners, executed a party wall agreement providing for the building of the wall and stipulating that if it should ever be in need of repairs, the expenses should be borne by both parties, and it was stipulated that the covenant should run with both properties. A. having agreed to convey his lot, the question was whether the title was clear or whether the party wall agreement formed an incumbrance. Held, that it constituted an incumbrance on the property, since at any time the owner might be forced to contribute with his neighbor for the repair of the wall : *Corn v. Bass*, 59 N. Y. Suppl. (Supreme Court) 315.

The question whether or not rent abates when a portion of the leased premises are taken under the power of eminent domain has been touched upon by the Supreme Court of Pennsylvania, though no binding position has been taken by the court as yet. *Uhler v. Cowan*, 44 Atl. 42, was an action against the tenant for rent for the quarter from Jan. 1, to April 1, 1897. The affidavit of defence admitted

Abatement of Rent where Portion of Leased Premises are Taken by Eminent Domain

**REAL PROPERTY (Continued).**

the liability for rent up to Jan. 26, 1897, but averred that on Oct. 26, 1896, the City of Philadelphia gave plaintiff notice that three months after that date a portion of the leased premises would be taken for a public wharf; that plaintiff gave defendant notice of the city's intention; and that on Jan. 26, 1897, defendant surrendered that portion of the premises to the city. The lower court gave judgment to the plaintiff for want of a sufficient affidavit of defence, and defendant appealed to the Supreme Court.

The latter reversed the judgment of the court below, but the opinion of Justice McCollum distinctly states that this is not to be regarded as a final adjudication of the general question involved, but that the court wishes to postpone its decision until it has before it a record which presents the facts more clearly than those given in the statement of claim and the affidavit of defence. However, in commenting upon the question involved, the court says that notwithstanding the contrary decisions of other states, such as *Stubbings v. Evanston*, 136 Ill. 37, yet it sees no reason why it should not apply to the case of the partial taking of the rented premises the rule laid down by Justice Sharswood, in *Dyer v. Weightman*, 66 Pa. 425, namely, that where the whole of the demised premises are taken, the rent abates. The court cites with approval Mills, Em. Dom., § 69, Lewis, Em. Dom., 483, and an interesting article upon the subject by Joseph H. Taulane, Esq., of the Philadelphia Bar, 29 Am. Law Rev. 351.

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**TRIAL.**

A motion for a new trial in an action against a city for injuries received by reason of a defective sidewalk was made upon affidavit of one B., who deposed that during the progress of the trial he had seen A., one of the jurors, together with other persons, who, he was informed, were other members of the jury, visiting the scene of the accident and measuring off the ground. A. filed an affidavit denying B.'s allegations. The Supreme Court of New York refused to disturb an order denying a new trial, since, even if the conduct of the jury had been to the prejudice of the petitioner, the fact that the single affidavit charging it was denied, justified the trial judge in refusing the new trial: *Haight v. Elmira*, 59 N. Y. Suppl. 193.

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**TRUSTS.**

In *St. Peter's Church v. Brown*, 43 Atl. (Rhode Island) 642, a bequest in trust to a church, to use and apply the income

TRUSTS (Continued).

**Charities** therefrom for church purposes, was upheld, and a trustee appointed to administer the trust, though such church, at the time of the death of the testator and at the time of the probate of the will, was not an incorporated body. See *Cocks v. Manners*, L. R. 12 Eq. 574.

It requires very strong evidence to establish the fact that a trustee has repudiated the trust and claimed the property as his own, so that statute of limitations will run in his favor against the *cestui que trust*. In *In re McCormick*, 59 N. Y. Suppl. 374, the Surrogate's Court of New York did not think that such a disavowal of the trust had been established by the fact that for twenty years the trustee had characterized his payments to the beneficiary as gifts from himself to the beneficiary.

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WATERS.

**Raise of Grade of Street, Prevention of Surface Water Flow** An action was brought against a city, in which the complaint stated that the city had raised the grade of the street in front of plaintiff's property, and that by reason of such change of grade the natural flow of surface and other waters from plaintiff's lot was impeded and the waters flowed back into plaintiff's dwelling. The plaintiff seemed to have based his claim on the idea that the street was a sort of a servient tenement, under the civil law rule that where two properties adjoin, the owner of the lower one may not raise the level of his land so as to obstruct the natural flow of surface water from the upper.

The Supreme Court of California very properly held, that, however this doctrine might apply to lands situate in the country, the rule in cities was different where both streets and lots may be improved without any thought of what becomes of the surface water from the neighboring properties: *Lampe v. San Francisco*, 57 Pac. 461.

**Waters, Damages, Pleading** In *Baumgartner v. Sturgeon River Boom Co.*, 79 N. W. 566, the Supreme Court of Michigan has reiterated its ruling in *Booming Co. v. Jarvis*, 30 Mich. 308, that no matter how necessary it may be for the preservation of logs to catch them at a certain boom, if in so doing the owner of the boom backs up water on the land of riparian owners he is liable at all events. The question of negligence is unimportant. In the present case a demurrer to a statement which failed to aver negligence on the part of the boom company was overruled.



**WILLS.**

A testator gave his son the income of \$6000, for life, thereafter it was to be held and enjoyed by the son's widow, if he should leave one, while she remained such. After  
**Vested**  
**Remainder** his son's death and the death or marriage of his widow, he bequeathed said \$6000 to his son's children and to the legal representatives of such of them as might be dead, to be divided equally between them, giving to the legal representatives of any deceased child the same share to which said deceased child, if living, would be entitled. The son died leaving one child who died before her mother. Held, that the child took a vested remainder on the testators death, and that on her death the mother inherited the \$6000: *Thyng v. Lane*, 43 Atl. (N. H.) 616.

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NEGLIGENCE; INSANITY AS DEFENCE FOR TORT; WILLIAMS V. HAYS (N. Y.), 52 N. E. 589 (1899). This was an attempt to hold the captain of a brig responsible for negligently causing the destruction of his vessel. The jury found that an ordinarily prudent man would have avoided the loss. The defendant claimed that while doing the acts complained of he was unconscious and knew nothing of what occurred; that in fact he was, from some cause, insane, and therefore not responsible for the loss of the vessel. At the trial the case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence, but if insane, was not responsible. Judgment being rendered in favor of the defendant, an appeal was taken, and the Court of Appeals, in an opinion by Earl, J., overruled the lower court, on the general rule that an insane person is just as responsible for his torts as a

sane person, except where intention is an essential ingredient. No distinction was drawn between negligence and other torts, but it was suggested that had the insanity of the captain resulted from his efforts to save the ship during the storm through which it passed, a different case might be presented. On the second trial of the case the lower court assumed that the captain's insanity was the result of his great exertions to save his ship, but failed to see how that fact presented any exception to the principle laid down, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. The court of appeals held that this carried the law of negligence to an unreasonable point, and again reversed the judgment.

The responsibility of an insane person for negligence is the subject of much discussion among the text writers. See *Harvard Law Review*, May, 1896, p. 65. Wharton, in his book on Negligence, observes that negligence is not imputable to persons of unsound mind, the law intervening to protect them, at least, as tenderly as it does persons capable of taking care of themselves. See *Chic. & A. R. R. Co. v. Gregory*, 58 Ill. 226 (1871). Similar rules are laid down in Beven on Negligence, 2d Ed., pp. 52-55; Jaggard on Torts, Vol. II, p. 872; and by Clerk and Lindsell on Torts, pp. 11, 34. The opposite view is held by Shearman & Redfield on Negligence, Vol. I, sec. 121; Pollock on Torts, p. 46; and Cooley on Torts, 2d Ed., 117. Cooley sees no distinction between responsibility for negligence and any other tort, such as trespass. He points out (p. 98) that the wrong "consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it." He recognizes that there is an apparent hardship, but declares it to be a question of policy, a choice having to be made between two innocent parties. The American cases follow Mr. Cooley's view with scarcely a dissenting voice. On insanity as a defence for torts in general, see *Beals v. See*, 10 Pa. 56 (1848); *Lancaster Co. Bank v. Moore*, 78 Pa. 407 (1875); *Wirebach's Ex. v. First Nat'l Bank*, 97 Pa. 543 (1881); *Ins. Co. v. Shewalter*, 40 W. N. C. (Pa.) 80 (1896); *Jewell v. Colby*, 66 N. H. 399 (1890); *McGee v. Willing*, 31 Leg. Int. (Pa.) 37 (1874); *Sheppard v. Wood*, 1 Lanc. (Pa.) 175 (1884); *Weaver v. Ward*, Hobart, 134 (1724); *Moore v. Crawford*, 17 Vt. 499 (1845); *Bush v. Pettibone*, 4 N. Y. 300 (1850); *Krom v. Schonmaker*, 3 Barb. 650 (1848); *Cross v. Kent*, 32 Md. 581; *Behrens v. McKenzie*, 23 Iowa, 343 (1867); *Ward v. Constatter*, 4 Bax. 64 (1874); *McIntyre v. Sholty*, 13 N. E. 239 (1887). The following are cases where the tort complained of was negligence: *Neal v. Gillett*, 23 Conn. 437 (1855); *Morain v. Devlin*, 132 Mass. 87 (1882); *Brown v. Howe*, 9 Gray, 84 (1857); *Beals v. See*, 10 Pa. 56 (1843). Ordonaux's Judicial Aspects of Insanity, Chapter VII, contains a collection of cases on this subject.

The case of *Chic. & A. R. R. Co. v. Gregory*, 58 Ill. 226 (1871), is cited by Wharton as supporting his view of the subject.

In that case the court refused to impute contributory negligence to an imbecile child who sought to recover damages for injuries received upon a railroad track. The case, however, does not seem to support the rule contended for. It is true that an insane person cannot be said to be really negligent, but, as stated in *Karow v. Ins. Co.* (Wis.), 15 N. W. 27, damages are recovered "not on the ground of *negligence*, as that word is usually understood, but in the language of Chief Justice Gibson (*Beals v. See, supra*,) on the principle that, where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it." This being the reason of the rule adopted by the cases, it will be seen that the facts in *Chic. & A. R. R. Co. v. Gregory* do not fall within its spirit, and the case is no authority against it.

Accepting the doctrine of the cases, that insanity is not a good excuse for negligence, the lower court, in the case before us, found that the condition of the captain was brought about by his unceasing efforts to save his ship. For more than two days he was constantly on duty, refusing to leave the deck until he was exhausted. Finally he went to his cabin, took a large dose of quinine and lay down, and from that time until he found himself in the life saving station, he was found to have been deranged. As stated above, however, this state of facts did not, in the eyes of the trial judge, affect the question. The view of the Court of Appeals was that it altered the case entirely. The Court of Appeals cites no cases in support of its view, but reasons as follows: "The man is not yet born in whom there is not a limit to his physical endurance, and, when that limit has been passed, he must yield to laws over which he has no control. . . . What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must or be responsible." That one should be held responsible for omitting to do impossible things is looked upon by the court as an absurdity, and as the law does not suffer an absurdity, the defendant was held not liable. At first blush it would seem equally absurd to hold any insane person responsible for negligence, diligence being to such persons a practical impossibility. But it is submitted that the Court of Appeals is right, and the trial judge wrong, not because insanity should be a defence for negligence, but because the real defence of the captain was not his insanity, but the fact that he had done all that an ordinary prudent man could do under the circumstances and could do no more. Had he been swept overboard by the storm and lost, the case would have been no stronger. The principle involved is the same as that in the case in which a driver of ordinary skill and prudence lost control of his horses, and was held not to be liable for damage sustained by a passer-by. See *Brown v. Collins* (1873), 53 N. H. 442, and cases there commented upon.

NEGLIGENCE ; INJURIES SUSTAINED BY A PERSON WHILE A TRESPASSER. IN *Quigley v. Clough*, 53 N. E. 884—a Massachusetts case decided in May, 1899—suit was brought by an involuntary trespasser for injuries sustained during the trespass and recovery was denied. The case arose on the following state of facts: The defendant was the owner of a corner property; a house stood on his lot, but at some distance from each of the intersecting streets, and passers-by were in the habit of taking a short cut across the lot. To prevent this he built a fence from his house to the street corner and later made it of barbed wire. The plaintiff coming along the street one dark night, by mistake left the sidewalk, ran into the fence, and received injuries for which he brought suit with the result stated above.

The case of *Howland v. Vincent*, 10 Metc. 371 (1845), cited by the court, is in accord with this decision. There the owner of land had made an excavation for a cellar about a foot or two from the sidewalk and had taken no precaution to prevent passers-by from falling in. The plaintiff in that case met with an accident in much the same manner as in the case of *Quigley v. Clough*, but no recovery was allowed him. The case of *McIntire v. Roberts*, 149 Mass. 450 (1889), also supports this view.

The well-known spring-gun case, in which a man has been held liable for injuries inflicted upon trespassers by concealed spring guns, is referred to; but a substantial distinction is made by Judge Holmes, when he points out in that case—*Bird v. Holbrook*, 4 Bing. 628—the *intention* of the defendant was to inflict personal injuries upon the trespasser, whoever he might be; and the case was much as though the defendant had found one trespassing on his land and then assaulted him. In *Quigley's* case the court does not admit that any intention to injure existed, but regards the barbed wire fence as a natural means of preventing the public from walking across the defendant's lot and a means wholly devoid of malice or intent to injure.

As against the position taken by the court, the case of *Marble v. Ross*, 124 Mass. 44 (1877), was strongly urged. There the owner of a field kept in it a vicious stag. A trespasser received injuries from this stag, and the court said that an action could be maintained to recover damages for the injuries received, provided the trespasser did not go on the land with knowledge of the danger. It was said that a duty vested upon the owner of keeping and restraining the stag at his peril. But here again an apparent distinction exists; for the stag is the active *cause* of the injuries sustained, while in the case in hand the fence is an *inert* passive condition of the injuries. In the case of *Marble v. Ross*, the court says, "The unlawful character of his (*i. e.* the trespasser's) act did not contribute to his injury or affect the defendant's negligence." Such a statement could not be made with regard to the facts in *Quigley's* case. So, on the other hand, in *Marble v. Ross*, the trespass was a mere *condition* of the injury, while in *Quigley's* case it was the *cause*.

The case stands, then, for the proposition that a trespasser, though involuntarily such, cannot recover for injuries sustained during the trespass to which injuries his trespass is a contributing cause and not merely a condition ; this is well in line with authority.

An illustration of it is found in the Pennsylvania case of *Gillespie v. McGowan*, 100 Pa. 144 (1882). In this case a child between seven and eight years old wandered on to the defendant's land and happened upon an uncovered well some distance from the sidewalk. In trying to catch some fish, the child fell in and was drowned. No recovery was allowed, the court declaring that the child was subject to the law relating to trespassers and saying that " 'A man must use his own property so as not to incommode his neighbor,' but this maxim extends only to neighbors who do not interfere with it or enter upon it."

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## BOOK REVIEWS.

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THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA. By THOMAS M. COOLEY, L.L. D. Third Edition, revised by ANDREW C. McLAUGHLIN, A. M. L.L.B.

It will probably be a matter of gratification to those who used the earlier editions of this work to know that a third edition has appeared, which, besides containing valuable revisions and additions, calls attention to the many changes in Constitutional Law during the last decade. This will make the little book as useful as ever for some years to come.

From the wide circulation and general recognition already accorded to its first and second editions "The General Principles" cannot be said to be in need of a renewer.

The work, although somewhat brief in its treatment, is remarkably clear and concise, and fully carries out the statement made by Judge Cooley in its first edition. He says, "The reader will soon discover that mere theories have received very little attention, and that the principles stated have been settled judiciously, or otherwise, in the practical working of the government." The separation of decision from dicta, applied practice from theory, is, in Constitutional Law of all subjects most difficult ; and realizing this the student and reader will be amazed to see how far the learned authors have succeeded.

Faced by the danger of becoming too theoretical on the one hand, and of compiling a mere digest of decisions on the other, Judge Cooley and his revisor, Professor McLaughlin, have avoided both these evils. As is necessary in a work intended for the general student, as well as law student, the principles and deductions stated are condensed. Yet there is always sufficient data given in the admirable foot-notes to enable the student to test for himself any principle by case reading. In their treatment of that intricate

subject "Regulation of Commerce" the authors have been especially fortunate. No case, unless, indeed, it be of recent date, is relied upon for any principle which time has not let live. This avoids infinite confusion in the student's mind as to what has been and is the construction placed upon state and federal power. It gives the student some definite information as to what is settled, and leaves him likely to pursue further work on his own account.

The chapter entitled "Checks and Balances in the Government" is of especial interest in these days, when we hear it said by some that checks and balances exist in theory, rather than practice. Whether theoretical or practical, it is well to have this chapter, since it speaks of one of the conceptions which gave birth to our great Constitution.

On the whole, the book is accurate, and for a one-volume work wonderfully comprehensive.

*W. E. C.*

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THE LAW OF NEGLIGENCE. By THOMAS WILLIAM SAUNDERS.  
Second Edition revised by E. BLACKWOOD, B. A., LL. D.  
London: Butterworth & Co. 1898.

The small bulk of this, the second edition of Saunders on Negligence, necessarily prevents any exhaustive treatment of the subject, at this day a very broad one, and yet in examining some of the chapters one is surprised at the thoroughness with which the author and editor have accomplished their work. The preface states the purpose of the work to be the "supplying of a portable and cheap text book, which will give both the principles of the law and the cases which set them forth." The author plunges into the subject at once with a chapter on Negligence and compares the various definitions of the term. He criticizes the continued use of textbook writers and others of the term "gross negligence," saying, that it has yet to be discovered that it means anything definite or more than actionable negligence, and closes the chapter with a paragraph on "contributory negligence." Some reference is made to the doctrine of proximate cause, the awarding of vindictive damages for "gross negligence and contributory negligence on part of children."

The author then leaves the field of general principles and discusses specific forms of negligence. Chapters then follow dealing with the duty of care with regard to land, and then with respect to chattels. In this connection he discusses the law with respect to dangerous things—their possession, use and forwarding—the presence in particular instances of "scienter" and the evidence thereof.

The important branch of employer's liability is discussed in the light of the charges made therein by the Employer's Liability Act of 1880 and the Workmen's Compensation Act of 1897. These, however, have only a partial interest to the American



reader, since they deal with phases of the law of master and servant which are as yet uncommon in this country, only a few of our states having enacted similar legislation. The author dwells at length on the English procedure under this act, and has doubtless furnished to the English practitioner much information of value and easy of access. The parts with reference to these two acts are, of course, additions by the editor. He shows how the doctrine of common employment has been cut down by the Act of 1880, and what a great enlargement of liability of the employer along different lines was made in the passage of the Compensation Act of 1897.

While the ground covered is, in the main, adequately treated in view of the limited space at the author's command, nevertheless the work has not the symmetry of arrangement one would expect. Undue prominence is, in several instances, given to topics which might with advantage be replaced by others. The important questions arising under proximate and remote causes and the effect of intervening causes are passed over with very slight attention. One thing, however, which must be commended highly, is the very copious citation of cases, every proposition being well sustained by the authorities. A carefully arranged table of cases, and accurate index complete what will, no doubt, prove a very acceptable contribution to the literature of the profession.

*J. A. McK.*

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## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE.**

Edited by JOHN CUTLER. London: Butterworth & Co. 1898.

**PRACTICE IN ATTACHMENT AND GARNISHMENT OF PROPERTY IN THE STATE OF OHIO.** By JAMES M. KERR. Norwalk, Ohio: The Laning Printing Co. 1898.

**A TRUSTEE'S HANDBOOK.** By AUGUST P. LORING. Boston: Little Brown & Co. 1898.

**THE LAW OF DEBTOR AND CREDITOR.** By RUFUS WAPLES. Chicago: T. H. Flood & Co. 1898.

**EXPERIENCE IN THE UNITED STATES SUPREME COURT.** By A. H. GARLAND. Washington, D. C.: John Byrne & Co. 1898.

**THE ELEMENTS OF MERCANTILE LAW.** By T. M. STEVENS. London: Butterworth & Co.

- HISTORY OF THE LAW OF REAL PROPERTY.** By KENELM EDWARD DIGBY. Fifth Edition. Oxford Press, London and New York: Henry Frowde. 1897.
- THE FEDERAL COURTS.** By CHARLES H. SIMONTON. Richmond, Va.: B. F. Johnson Publishing Co. 1898.
- THE ANNOTATED CORPORATION LAWS OF ALL THE STATES.** By ROBERT C. CUMMING, FRANK B. GILBERT and HENRY L. WOODWARD. Three Volumes. Albany: J. B. Lyon Company. 1899.
- GENERAL DIGEST, AMERICAN AND ENGLISH.** Vol. VI. New Series. Rochester, N. Y.: Lawyers' Co-operative Publishing Co. 1899.
- LEGAL DECISIONS, MEDICAL.** By W. A. PURRINGTON, of the New York Bar. New York: E. B. Treat & Co. 1899.
- AMERICAN PRACTICE REPORTS.** Vol. I. Edited by CHARLES A. RAY, LL.D. Washington: Washington Law Book Co. 1899.
- STATE TRIALS.** By CHARLES EDWARD LLOYD. Chicago: Callaghan & Co. 1899.
- PROBATE REPORTS, ANNOTATED.** Vol. III. By FRANK S. RICH. New York: Baker, Voorhis & Co. 1899.
- THE GROWTH OF THE CONSTITUTION.** By WILLIAM M. MEIGS. Philadelphia: J. B. Lippincott Co. 1900.
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- COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS.** Vol. VII. By SEYMOUR THOMPSON, LL.D. San Francisco: Bancroft-Whitney Co. 1899.
- GREENLEAF'S TREATISE ON THE LAW OF EVIDENCE.** Vol. I. Edited by JOHN HENRY WIGMORE. Boston: Little, Brown & Co. 1899.
- QUESTIONS AND ANSWERS FOR BAR-EXAMINATION REVIEW.** By CHARLES S. HAIGHT. New York: Baker, Voorhis & Co. 1899.
- THE CLERKS' AND CONVEYANCERS' ASSISTANT.** Second Edition. By BENJAMIN V. ABBOTT and AUSTIN ABBOTT. New York: Baker, Voorhis & Co. 1899.
- THE LAW OF PLEADING.** By EDWIN E. BRYANT. Boston: Little, Brown & Co. 1899.
- FIRST STEPS IN INTERNATIONAL LAW.** By SIR SHERSTON BAKER. Boston: Little, Brown & Co. 1899.

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## SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

PART IV.

SECTION VI.—SHOULD THE SUPREME COURT ALLOW WRITS OF ERROR TO STATE COURTS IN CASES SIMILAR TO GELPCKE v. DUBUQUE?

We have elsewhere incidentally referred to the anomalous position assumed by the Supreme Court on this question. In cases of this nature, where they acquire jurisdiction by reason of the citizenship of the parties, they disregard the decisions of state courts. They do this because the state court has upheld an altered interpretation of a state statute, which impairs the obligation of a contract. In this class of cases they hold such an interpretation to be a "law" within the meaning of the federal clause. But if the case is brought up by writ of error to a state court, the Supreme Court will refuse to take jurisdiction, because, they say, for purposes of jurisdiction a state decision construing a statute is not a "law."

Thus, one who is so fortunate as to be a citizen of a state other than the one where the cause of action arises may obtain

relief; while an individual who is so unfortunate as to be a citizen of the same state has no remedy. This condition of affairs is little less than monstrous. The two positions are absolutely irreconcilable. We shall discuss this subject under three heads:

*A.* An examination of the cases similar to *Gelpcke v. Dubuque* which have come up by writ of error to state courts and have been refused.

*B.* An examination of cases coming up by writ of error to state courts where the act involves a contract.

*C.* The question of jurisdiction examined on principle.

*A. An examination of the cases similar to Gelpcke v. Dubuque which have come up by writ of error to state courts and have been refused.*

Ever since the date of the decision in *Gelpcke v. Dubuque* cases from state courts involving similar facts have been consistently applying to the Supreme Court for their consideration and have been consistently refused. The two lines of cases have grown up side by side. The only explanation which can be offered for this strange spectacle is that the court recognized the justice of refusing to give a state court's re-interpretation of a statute a retroactive effect, and at the same time shrank from calling it a "law" in the technical language of the judiciary acts. That this would have been not only the more honest but also the more correct course, would follow from the conclusions worked out in this paper.

The first case where the question was before the court was *Railroad v. Rock*.<sup>1</sup> In that case the facts were identical with *Gelpcke v. Dubuque*, except for the circumstance that here the parties were citizens of the same state. The court dismissed the writ because they declared that the case might have been decided on the ground of fraud, and that *not only must it be shown that a federal question might have been involved, but it must be shown that it necessarily was involved*. This ground was ample, and the court so considered it, for the dismissal of

<sup>1</sup> 4 Wall. 177 (1866), Miller, J.

the writ. What follows cannot have the full force of a decision, but must partake of the nature of a dictum.

The court, however, then went on to say: "That counsel had based their whole claim on the ground that 'the Supreme Court of Iowa had made a decision impairing the obligation of a contract,' and had based their entire argument on the fundamental error that this court can as an appellate tribunal reverse the decision of a state court, because that court may hold a contract to be void which this court might hold to be valid." It is submitted that if counsel did base their whole claim on that broad assumption, they deservedly and unquestionably failed to make out a case for the consideration of the Supreme Court of the United States.

The argument of counsel is very briefly reported, so we can hardly tell whether or not they distinguished between state decisions which interpret state statutes, and state decisions which merely interpret contracts. Mr. Justice Miller, who delivered the opinion, made no distinction, and evidently considered only state decisions in their broad sense. Viewed in this light, the statement of Mr. Justice Miller is unquestionable. He says that the court would refuse to assume jurisdiction, because "If this were the law, every case of a contract held by the state court not to be binding, for any cause whatever, would be brought to this court for review, and we should thus become the court of final resort in all cases of contract where the decisions of the state courts were against the validity of the contracts set up in those courts."

No one would question Mr. Justice Miller's argument if his premises were sound. He assumes that the Supreme Court were asked to review the state court's construction of a contract. It is submitted that this is incorrect. It was not the construction of the contract, *but the interpretation of the statute*, that impaired its obligation. The Supreme Court were asked to review the decision which *upheld* and *applied* that altered interpretation.

*Railroad v. Rock* first laid down the rule that the Supreme Court would not in such cases assume jurisdiction. The part of the opinion devoted to the question we are discussing, which

was only a few lines in extent, was not necessary for the decision, and yet this case undoubtedly is the foundation of all the other decisions which follow it in adopting the same course.

As these cases are all very similar in their facts, an extended investigation would be of no service. We shall quote, however, from one of the later cases to show the development of the doctrine, and cite some of the intervening cases in the note.<sup>1</sup> In *Bacon v. Texas*, Mr. Justice Peckham for the court says: "The argument involves the claim that jurisdiction exists in this court to review the judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract, by reason of the alteration by a state court of a construction heretofore given by it to such contract, or to a particular statute, or series of statutes, in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist. It has been held that where a state court has decided, in a series of decisions, that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to railroad companies, and such had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after the issue of the bonds, and holding that the legislature has no power to permit the municipality to issue them, and that they were therefore void. Such are the cases of *Gelpcke v. Dubuque* and *Douglas v. Co. of Pike*. In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity, made by the highest court of a state, prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract, and will be given effect to by this court, as against a subse-

<sup>1</sup> *R. R. v. McClure*, 10 Wall. 511 (1870), Swayne, J.; *Bank v. Bank*, 14 Wall. 9 (1871), Swayne, J.; *Palmer v. Marston*, 14 Wall. 10 (1871), Swayne, J.; *Kennebec River v. R. R.*, 14 Wall. 23 (1871), Miller, J.; *Dugger v. Bocock*, 104 U. S. 596 (1881), Waite, C. J.; *Lehigh Water Co. v. Easton*, 121 U. S. 388 (1886), Harlan, J.; *N. O. Water Works v. La. Sugar Ref. Works*, 125 U. S. 19 (1887); *Central Land Co. v. Laidley*, 159 U. S. 102 (1895), Gray, J.

quent changing of decision by the state court, by which such legislation might be held to be invalid. But effect is given to it by this court, only on appeal from a judgment of a United States court and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void, which it had prior thereto held to be valid. It has no jurisdiction, because of the absence of any legislation subsequent to the issuance of the bonds, which had been given effect to by the state court. In other words, we have no jurisdiction because a state court changes its views in regard to the proper construction of its state statutes, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract."<sup>1</sup>

This opinion is quoted somewhat at length that we may have before us the reason why a writ of error is not allowed, and that we may perceive the distinction between this case and the line to which Mr. Justice Peckham referred as represented by *Gelpcke v. Dubuque* and *Douglas v. Co. of Pike*. We do not derive much satisfaction from a perusal of his language, and yet this is the latest exposition of the subject.

The reason given why the court does not take jurisdiction is because there has been no subsequent statute passed impairing the obligation of contracts, and which the state court has upheld, which is declared to be a condition precedent to bringing up a case under the 25th section of the Judiciary Act. The court does not attempt to distinguish the cases coming up from Circuit Courts. Mr. Justice Peckham evidently realized that they cannot be distinguished. He contents himself by stating that in the one case the court will overthrow the authority of the state court, and in the other case they will not assume jurisdiction.

After this glance at the cases we come back again to our starting point. As late as January 9th, in the current year, the federal court reasserted the doctrine that a state court's

<sup>1</sup> 163 U. S. 207 (1895), Peckham, J.



interpretation of a statute is a "law" within the meaning of the federal clause forbidding states to pass laws impairing the obligation of contracts; and that they refuse to apply it for that reason.<sup>1</sup> But in the latest case which we have examined on the other side, we find it just as positively stated that such interpretation is not a "law" within the meaning of the 25th section of the Judiciary Act. This is the situation, not entirely satisfying, which we find in that field.

*B. An examination of cases coming up by writ of error to state courts where the act involves a contract.*

As this class of cases has already been discussed in a former section, we shall not re-examine the early cases at this point. We wish, however, to ask careful attention to the very recent case of *McCullough v. Commonwealth of Va.*<sup>2</sup> The famous coupon cases of Virginia are well known, and also the frequent attempts of Virginia to limit her liability by legislative enactments. The original coupon act was passed on March 30, 1871, and provided for the issuance of coupon bonds, which were declared to be receivable in payment of taxes due the state. This act was uniformly held by the Supreme Court of Virginia to be a constitutional and valid act during a period of twenty-seven years. Finally, the Supreme Court of Virginia adjudged the act to be null and void, and the case, in which this action was taken, was then brought into the Supreme Court by writ of error.

The judgment of the lower court was entirely directed to an investigation of the original act. Nothing else was ever mentioned. Mr. Justice Peckham, in his dissenting opinion, observes, "The opinion of the state court shows that the judgment went upon the original and inherent invalidity of the coupon statutes, and its judgment in that respect, as I shall hereafter attempt to show, gave no effect to any subsequent legislation."

The question was then squarely before the court. Is a decision adjudging an act void which, during a long period of

<sup>1</sup> *Loeb v. Trustees of Ham. Co.*, 91 Fed. 37 (1899), Thompson, J.

<sup>2</sup> 172 U. S. 102 (1898), Brewer, J.

years, the same court had held valid, a "law" impairing the obligation of contracts; or, in other words, had the court authority to review?

This is a peculiarly strong case. Mr. Justice Brewer observes: "Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guarantee of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force, and that all the transactions which have been had, based thereon, rested on nothing. Such a result is so startling that it, at least, compels more than ordinary consideration." These considerations were so powerful as almost to overthrow the court's hesitancy to call a spade a spade and admit that this decision was a "law."

The court did assume jurisdiction, but not upon the ground we have indicated. Instead, it cast about for an excuse to take cognizance of the case, and finally hit upon the expedient of saying that, while the decision did not *refer* to the later acts, yet its *effect* was to *uphold* them by removing the only constitutional bar to their validity; *i. e.*, vested rights acquired under the act of '71.

This reasoning is, indeed, most attenuated, and Mr. Justice Peckham, dissenting, effectually shatters it. He says: "The state court has held the coupon acts to be entirely void, because in violation of the state constitution in existence when they were passed. . . . This judgment did not give the slightest effect to the legislation subsequent to the coupon statutes. It simply held there were no coupon statutes because those which purported to be such were totally void. No subsequent statute was necessary, and none such was given effect to. Striking down the coupon statutes effectually destroyed any assumed right to pay taxes in coupons, and the subsequent legislation was needless and ineffectual."

This language is quoted, not because we concur in Mr. Justice Peckham's dissent, for we do not, but to show how completely the court failed to justify its assumption of jurisdiction on this ground.

We submit that the case was correctly decided, but that,

though not directly asserted, the real ground of taking jurisdiction was because the State of Virginia was attempting to impair the obligation of contracts by judicial legislation.

If this be not admitted then we must concur with Mr. Justice Peckham that the court had no jurisdiction.

This case plainly indicates that the Supreme Court, realizing that *judicial interpretation does have all the force of law, and that a change of construction does impair the obligation of contracts just as effectually as positive statutes*, are eagerly catching at every theory, no matter how shadowy, to give them jurisdiction.

We hope the time is not far distant when they will cease offering apologetic theories for assuming the jurisdiction which is theirs by right.

*C. The question of jurisdiction examined on principle.*

In view of the conclusions worked out in the preceding sections of this paper, it was really unnecessary to discuss the action of the court under A and B, but we do so to show how grave is the situation before us, and that the court are already nearing the point where they are ready to accept the full theory of judicial legislation.

We cannot better illustrate the theory that the court have power to assume jurisdiction than by making use of the facts involved in *Railroad v. Rock*, which, it will be remembered, are similar to *Gelpcke v. Dubuque*, except in that the parties were both citizens of Iowa.

We will take Mr. Justice Miller at his word, and assume that no cases can be brought into the Supreme Court by writ of error under the 25th section of the Judiciary Act, unless the judgment of the state court has upheld a law passed subsequently to the making of the contract. As to the meaning of law, we quote from Mr. Justice Field's opinion in *Williams v. Bruffy*:<sup>1</sup> "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited relating to the jurisdiction of the court."

<sup>1</sup> 96 U. S. 176 (1877), Field, J.

The Iowa Supreme Court, in *Railroad v. Rock*, decided two separate and distinct points :

(1) That the legislative act was invalid.

(2) That that interpretation should be applied to the contract before it.

The first point the Supreme Court had no jurisdiction to review. It could no more interfere with it than it could have repealed a repealing act overturning the same law. But what about the second point? Here the state court *applied* an *interpretation of a statute* to a contract so as to impair its obligation. "That interpretation of a statute," as we have shown, is really an act of a legislative character. That part of the decision, which was purely judicial, upheld this "interpretation." It therefore upheld a "law." The fact that the same case involved both points makes the principle more difficult to see, but not less sound.

That a decision may involve both functions is not unfounded in authority. In the English case of *Winthrop v. Lechmere* a colonial act of Connecticut was declared void (because it was adjudged to be in conflict with the English law) by an order in council. The decision also involved a review of four judicial sentences, and one judicial order of the Superior Court of Connecticut. Mr. Brinton Coxe says: "In the writer's opinion, the order in council determining the appeal of *Winthrop v. Lechmere* was actually of a mixed nature. He deems it partly judicial and partly legislative. It was no mere judicial judgment. That part of it was judicial which reversed and set aside the four sentences and declared the order of the court to be null and void. That part of it was legislative which declared the two acts of the colonial legislature to be null and void. The writer understands this view to be supported by authority. In an order in council dated April 10, 1730, the order in council determining *Winthrop v. Lechmere* is referred to. The action therein taken concerning the Connecticut act for settling intestates' estates, is expressly called *a repeal of that act*."<sup>1</sup>

<sup>1</sup> See *Judicial Power and Unconstitutional Legislation*, p. 212.

This is precisely the position which we now assume. That part of the Iowa decision which declared the act null and void was legislative ; it may be referred to in the language above cited, as a "repeal of the act." That part of the Iowa decision which upheld that "repeal" and so applied it as to impair the obligation of the contract before it, was judicial. It was, therefore, a judicial decision by the Supreme Court of the state, upholding and applying a "law" which impaired the obligation of the contract, and it should have been reviewed on writ of error by the Supreme Court of the United States.

The objection that this would throw open the door to a vast multitude of new cases, even if it were a legitimate objection, is not true. Mr. Justice Miller says that to allow writs of error in such cases would be "to permit an appeal to be taken every time a state court adjudged a contract to be void which we might think to be valid." It is submitted that this reasoning cannot be supported. It springs from the same fundamental error of assuming that it was the *construction of the contract*, and not the *interpretation of the act* which impaired its obligation.

We submit that, if a principle be correct, it should be made a rule of action, even though additional cases will thereby be admitted to the courts, and that the vast horde of contracts, adjudged void, which Mr. Justice Miller saw, in his imagination, ready to swarm into the Supreme Court as soon as they opened the door to cases like *Railroad v. Rock*, had no existence elsewhere. Cases like *Railroad v. Rock* would in all probability be less numerous than those like *Gelpcke v. Dubuque*.

Mr. Justice Miller further declares that there could be here no impairment, because the state court by its construction of its own statute, which was conclusive, had decided that no contract ever existed. This is arguing in a circle. It assumes in the first place that a state decision altering its former interpretation and declaring a statute void, makes it void *ab initio*, which is the very point at issue, and, in the second place, it again confuses the two separate and distinct things, the interpretation of the act and the construction of the contract.

It is said further that the federal clause is aimed at the legislative acts of the states and not at the decisions of its courts. This is of course true in theory. But this theory is not contradicted because, as we have shown, the decisions in the cases we are discussing are "legislative acts" in their intrinsic nature.

It is also declared that to allow writs of error would be to permit the Supreme Court to interfere with the state court's construction of state statutes. As we have already pointed out, in no sense would this be true. The federal clause, while theoretically aimed at the fundamental power of the state to make the law, really operates by preventing the application of forbidden laws by the state courts. As the Supreme Court cannot get out a writ of injunction to prevent a state from passing a law impairing the obligation of contracts, nor repeal it when it has been passed, so they cannot prevent nor change the state court's construction of its laws. In both cases the power of the court is simply preventive.

They say to the state legislature, "Pass what laws you please, we have no power to prevent you, but if your courts so apply a law as to impair the obligation of a contract *in a particular case*, then we shall step in and protect that contract." In most cases this practically nullifies the law, but in any case the court do not go beyond the rights which they are protecting. The law may impair the obligation of the contract before them, and yet be valid as to other contracts. In such a case the court content themselves with neutralizing its effect in the case before them.<sup>1</sup>

So, in the same manner, the Supreme Court, addressing themselves to the state court, say: "Interpret your laws as you see fit. We have no power to prevent you. But if you so apply an interpretation as to impair the obligation of a contract, then we will protect that contract."

To both the court say: "Whatever you may or may not do, here is one field into which you may not enter. We stand here by virtue of the duty and privilege laid upon us by

<sup>1</sup> *Sturgis v. Crowninshield*, 4 Wheat. 122 (1879), Marshall, C. J.

the Constitution of the Union to prevent it, and we shall prevent it. But we have no intention of interfering with you in those fields where we admit you to be supreme."

The fear that the liberty of the state court to interpret its own laws will be taken away is thus seen to be unfounded. The power to do that does not exist. It is only the purely judicial action in *applying* either the statute or the interpretation of that statute which can be reviewed by the Supreme Court.

After all, the objection most often urged to permitting writs of error in this class of cases is a technical one. It is said that the judiciary act provides that a subsequent law must be upheld before the writ can be allowed. We believe that upholding an authoritative interpretation of a statute is upholding a "law." But if we are to be hindered by a procedural difficulty, when we are resting upon our constitutional rights, the difficulty should be obviated by altering the language of the act.

Although sometimes said, with fine irony, to be quite unusual in the law, it may not be amiss to survey this question, for a moment, from the standpoint of common sense.

Every one can see that to permit a court to unsettle rights, acquired during a long period of years, upon the faith of a law, sanctioned by every department of government, ought not to be allowed. Every business man knows that a system which makes it impossible for one ever to be sure what the statute law is, is most dangerous to the welfare of the community. It does not require one learned in the law to see that the decisions in *Gelpcke v. Dubuque* and kindred cases are pre-eminently just.

This may not be an argument, but, as practical men, we know that the law exists for the purpose of doing justice, and this fact should cause us to think twice before rejecting a theory which admittedly has always been just in its application, and before we refuse to apply that principle to a class of suitors equally as deserving as those to whom relief is granted.

Moreover, the full significance of the action of the court in refusing to assume jurisdiction has never yet been fully real-



ized. If a state can, by judicial legislation, pass laws impairing the obligation of contracts, it can also, in the same manner, enact *ex post facto* laws. Suppose, to take an extreme case, the offence of horse stealing at common law is punishable with death. Suppose a state passes a law reducing the punishment to fine and short imprisonment. Suppose, for a long period of years, this act is enforced by the courts and is uniformly held to be constitutional. The court then reverses its ruling and declares the act null and void. If Mr. Justice Miller's reasoning be correct, all those individuals who have stolen horses in the meantime can be condemned to death. It is no answer to say that the state would probably not take such action. If the principle be sound it must be correct in all possible situations. We submit that if a state should attempt, by judicial action, to thus in effect enact an *ex post facto* law, the Supreme Court would speedily forget their procedural scruples and would assume jurisdiction.

As lawyers, we know that judicial legislation is a fact with which we have to deal. We know that the states can and often do impair the obligation of contracts with impunity by means of legislative-judicial action. We see also a constantly increasing tendency on the part of the state courts to constitute themselves not only the judges of the *constitutionality* of legislative acts, but even judges of whether a law be not, in their opinion, *improper*, as appears from the opinion of a judge who arrogates to himself the right to overturn a law,<sup>1</sup> because it "is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile." This is *judicial legislation*, whatever may be thought of the principle. It should, in all cases, be recognized as such, and its effect defined and restrained, not given the unlimited extent of purely judicial decisions.

*Thomas Raeburn White.*

<sup>1</sup> *State v. Goodwill*, 33 W. Va. 802 (1889).

## A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART V.

The “ Constitutional Convention ” and its work are deserving of the closest attention and study in our present inquiry. We have seen that the avowed object for which the convention assembled was the amendment or alteration of the articles of confederation which experience had shown to be impossible to live under. The direction in which the alterations were to tend was toward the closer binding of the various states—not their separation. It was not the purpose of any of the delegations to weaken the already weak tie which bound them—it is possible that a good deal of the confusion arising under the articles might have been got rid of by this method; but such was not the thought of the statesmen who gathered together at Philadelphia. It is proposed to consider the formation and work of this convention very carefully; for the result of its work was of far-reaching importance, and for it to be correctly understood the causes which led to it must all be traced out. It is not necessary to go into the various defects of the confederation in this connection—but we must try to ascertain why and how the constitution recommended by the convention was so unlike the articles of confederation *fundamentally*.

The Committee of Congress appointed to consider the proposition of the delegates assembled at Annapolis, reported on February 21, 1787, the following resolution: “ Congress having under consideration the letter of John Dickinson, Esq., Chairman of the Commissioners, who assembled at Annapolis during the last year; also the proceedings of the said Commissioners, and entirely coinciding with them as to the inefficiency of the federal government, and the necessity of devising such further provisions as shall render the same adequate to the exigencies of the Union, do strongly recommend to the different legislatures to send forward delegates, to meet the proposed convention, on the second Monday in

May next, at the City of Philadelphia." It was immediately moved by the delegates from New York to postpone the report, and take up the following—a resolution which they offered as a substitute: "That it be recommended to the states comprising the Union, that a convention of representatives from the said states, respectively, be held at on for the purpose of revising the articles of confederation and perpetual union between the United States of America, and reporting to the United States in Congress assembled, and to the states respectively, such alterations and amendments of the said articles of confederation, as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union." This resolution was defeated on a "yea and nay" vote by six to three—two states, Connecticut and Georgia, being "divided," and Rhode Island and New Hampshire being absent. The "ayes" were Massachusetts, New York and Virginia. Immediately it was moved by Massachusetts to postpone the report once more and consider a resolution offered by her, which was amended and passed as follows:

"Whereas, there is provision in the articles of confederation and perpetual union, for making alterations therein, by the assent of the Congress of the United States and the legislatures of the several states; and, whereas, experience hath evinced, that there are defects in the present confederation, as a mean to remedy which, several of the states, and particularly the State of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these states a firm national government:

"Resolved, That in the opinion of Congress it is expedient that, on the second Monday in May next, a convention of delegates who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the articles of confederation, and reporting to Congress and the several legislatures such alterations and provisions

therein, as shall, when agreed to in Congress, and confirmed by the states, under the federal constitution adequate to the exigencies of government, and the preservation of the Union."

Now, here were three different resolutions amounting, when first looked at, to practically the same thing. But it is another instance of the jealous care with which men acted in those days, that neither the resolution of the Congressional Committee nor that of New York was satisfactory, but the amended Massachusetts resolution was passed, Connecticut alone *contradicente*. The committee resolution, we are told by Mr. Madison, only passed the committee by one vote. And New York had shown so "unfederal" a disposition that the delegates were suspicious of the resolution introduced by her—apparently on the "*Timeo Danaos et dona ferentes*" principle—needless in this case, as the resolutions were drawn by Hamilton.

The resolution of the committee was not voted down—but the Massachusetts resolution having passed, its consideration became unnecessary. The most contradictory objections were made to the recommending of a convention by Congress; by some it was thought to weaken the federal authority by sanctioning an extra-constitutional method of revising the articles; by others, as likely to arouse suspicion that Congress was seeking to increase its power.

The New York resolution and the Massachusetts resolution were voted for by some, for the reason that, in their opinion, it would be better for Congress to act at the instance of a state than of its own motion.

Many of the delegates openly stated that they considered the motion a "deadly blow" to the existing confederation. All agreed that some change was necessary; but only one, Mr. Bingham of Pennsylvania, expressed a wish for disintegration; he thought there should be several distinct confederacies, as the extent and varied interests of the states rendered a single confederacy impracticable.

Delegates to the convention had already been chosen by Virginia, North Carolina, New Jersey, Pennsylvania and Delaware, pursuant to the Annapolis recommendation, and

the others were not long in following. The convention assembled in Philadelphia on May 14, 1787, but as only a few states were represented, it adjourned until May 25th, when delegations from nine states attended.

Rhode Island took no part, from first to last, in the proceedings of the convention; the absent states on May 25th were Connecticut, New Hampshire and Maryland. Connecticut and Maryland appeared on May 28th, New Hampshire not until July 23d. As in Congress, the vote in convention was by states, the number of delegates varying from three each from Connecticut and New York to eight from Pennsylvania. Two delegates, Patrick Henry from Virginia, and William Jones from North Carolina, declined to serve. One, Richard Caswell from North Carolina, resigned. Other delegates were appointed in their places, and of sixty-two delegates in all accredited to the convention, seven only failed to attend. The credentials almost without exception simply authorize the delegations to represent the state in the convention. Delaware, however, provided against the acceptance by her delegation of any alteration of the provision in the articles of confederation entitling each state to one vote. The names of delegates were as follows, omitting those who did not attend: NEW HAMPSHIRE, John Langdon, Nicholas Gilman; MASSACHUSETTS, Elbridge Gerry, Nathaniel Gorham, Rufus King, Caleb Strong; CONNECTICUT, Wm. Sam. Johnson, Roger Sherman, Oliver Ellsworth; NEW YORK, Robert Yates, Alexander Hamilton, John Lansing. NEW JERSEY, William Livingston, David Brearley, William C. Houston, William Patterson, Jonathan Dayton; PENNSYLVANIA, Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris; DELAWARE, George Read, Gunning Bedford, Jr., John Dickinson, Richard Basset, Jacob Brown; MARYLAND, James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll, John Francis Mercer, Luther Martin; VIRGINIA, George Washington, Edmund Randolph, John Blair, James Madison, Jr., George Mason, George Wythe, James McClurg; NORTH CAROLINA, Richard Caswell (resigned), Alexander

Martin, William R. Davis, William Blount, Richard R. Spaight, Hugh Williamson; SOUTH CAROLINA, John Rutledge, Charles C. Pinckney, Charles Pinckney, Pierce Butler; GEORGIA, William Few, Abraham Baldwin, William Pierce, William Houston. We recognize many distinguished names in the list, and, on the other hand, there are many that few of us have ever heard since. Of the *personnel* of the convention as a whole, Mr. Meigs, in his recent most valuable work, "The Growth of the Constitution," has this to say: "Some few of the members strike me as weak, petulant, difficult, striving to make a record and keep themselves right with the public; while others were most earnest at the work in hand and ever ready to advise and aid in perfecting the instrument they were called upon to frame." In short, like all assemblages of this character, the convention had its due proportion of ability and mediocrity and perversity! It was evident from the very beginning that the delegates, many of them, at least, came with pre-conceived ideas, and some of these ideas were far in advance of the general idea in the resolution to which the convention owed its existence, viz., the amendment and revision of the articles of confederation. Before proceeding to the actual work of the convention, let us once more glance at its *personnel*. Mr. Fiske thinks it an ideal assemblage, with its strength and its weakness. It was composed of a large proportion of university graduates, of men of all ages from Dayton to Franklin, twenty-six to eighty-one, and it is worthy of remark that there were wide divergences in the known views of members of the same delegation. And it must also not be forgotten that the same remoteness from each other of the various states and their peoples existed as at the time of the confederation. There was less unitedness; there was no common enemy against whom all were struggling together. On the contrary, antagonisms had sprung up, undreamt of during the war, and yet, as we shall see, this diverse body of men felt the necessity of union as a *people* and went steadily forward in their work to this end, retarded, of course, by the troublesome spirits always to be found in conventions, and while the result of their labors was not unanimously recommended to Congress,

it was recommended by at least one vote from every state; in fact, by more than one from every state except New York—Lansing and Yates, two known and pronounced anti-federalists, declining to sign—and leaving to Alexander Hamilton the privilege of being the sole signer from the future “Empire State.”

Immediately upon the assembling of the convention, May 25, 1787, “George Washington, Esquire, late commander-in-chief,” was nominated and elected President. Credentials were read and a committee to prepare standing rules appointed. On reassembling on May 28th, the report of the Committee on Rules was received, containing nothing remarkable except, perhaps, a delightful reminder of the orderly and ceremonious way in which things were done in those days: “When the House shall adjourn, every member shall stand in his place until the President pass him.” It had been intended by the delegations from some of the larger states to protest against the equal vote of all the states; but they wisely refrained from antagonizing the smaller states in this way at the threshold, and the “one vote” rule prevailed. A rather noteworthy letter from some citizens of Rhode Island, enclosed in one from General Varnum to the President, was read and laid on the table. It expresses great regret at the non-representation of the state in the convention, a result brought about by the lower house of the assembly, against the wishes of the thinking people of the state. General Varnum pays his compliments to the legislators in this fashion: “Permit me to observe, sir, that the measures of our present legislature do not exhibit the real character of the state. They are equally reprobated and abhorred by gentlemen of the learned professions, by the whole mercantile body, and by the most respectable farmers and mechanics. The majority of the administration is composed of a licentious number of men, destitute of education, and many of them void of principle. From anarchy and confusion they derive their temporary consequence,” etc. Poor Rhode Island! it is at least gratifying to note that her absence from the convention was not due to the thinking and reputable citizens, but to that class which always



has been and always will be an unmitigated curse to any community it infests, and which will be found to infest any community wherein the government is ultra-democratic.

The real business of the convention was opened by Mr. Randolph on Tuesday, May 29th, when he brought forward what was known as the "Virginia plan," and advocated it. This plan had been prepared beforehand, of course, and was largely the work of Madison. Randolph, in speaking to the support of the resolution he was about to propose, declared the necessity for a government which could prevent invasion from abroad, or dissension among or sedition within the states themselves, defend itself against encroachments, and which should be paramount to the state constitutions—all of which attributes were lacking under the articles of confederation. He then presented the "Virginia plan," which was in the form of a series of resolutions, and was, therefore, strictly speaking, rather a suggestion of the lines on which a plan should be formulated than a plan in itself. It starts out with the rather obvious proposition that the character of the amendments to the articles should be such as would accomplish the ends desired; or, *verbatim*, "to accomplish the objects proposed by their (the articles') institution; namely, 'common defence, security of liberty, and general welfare.' " The second resolution begins with the words, "Resolved, *therefore*,"—and I suppose "therefore" is to be read into the balance of the resolutions, which numbered fifteen, exclusive of the first. They provide for a "National Legislature" of two branches, the first to be elected by the people of the states at various times, the members to receive liberal salaries for their services, and during service ineligible to any other state or United States office; the second branch to be elected by the members of the first from persons nominated to them by the several legislatures, likewise with liberal salaries, etc. Each branch, it is resolved, ought to have the power of originating acts. And conjointly they should possess all the powers of Congress under the confederation, and also power to legislate "in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of indi-

vidual legislation;" to have a negative upon all individual legislation which, *in their opinion*, contravenes the articles of union, or any treaty made by the Union; and, finally, to coerce forcibly states failing in their duty to the Union. They provide that a national executive be "instituted," to be chosen by the National Legislature, to be salaried, and ineligible a second time; to have authority to execute national laws and enjoy the executive rights vested in Congress under the confederation; also, with a convenient number of the national judiciary, (later provided for), to form a Council of Revision, "with authority to examine, before it shall operate, every act of the National Legislature and every act of a particular legislature before a negative thereon shall be final;" the dissent of the council to be conclusive, unless the law shall be re-passed or re-negated by members of each branch. The national judiciary, to be chosen by the National Legislature, is to consist of one or more supreme tribunals, and of inferior tribunals, the jurisdiction of the former to be purely appellate. The judges are to be chosen during good behavior, and are also to be liberally compensated.

The jurisdiction of the inferior tribunals is to extend to "all piracies and felonies on the high seas; captures from the enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested; or which respect the collectors of the national revenue; impeachments of any national officers; and questions which may involve the national peace and harmony." They recommend provision for the admission of new states; that the "territory" and "republican government" of each state should be guaranteed to it. They also recommend provision of the amendment of the articles of union, without the consent of the National Legislature; the binding by oath of *state* legislatures, executives and judiciaries, to support the articles of union; and, finally, the submission of the amendments proposed by the convention, they recommend should be submitted after the approbation of Congress, to assemblies, recommended by the legislatures, to be chosen by the people for the express purpose of considering them. These resolutions were referred

to the Committee of the Whole, into which the convention resolved itself next day. After the offer of these resolutions by Mr. Randolph, Mr. Charles Pinckney, of South Carolina, offered a plan for a federal constitution, which is unfortunately lost to us, all authorities agreeing that the paper printed in the "Debates" is not that which was submitted to the convention. Mr. Yates, of New York, in his notes of the debates and proceedings, says that both Randolph and Pinckney candidly confessed that their plans were not intended for a federal government, but for a "*strong, consolidated* (italics Mr. Yates's) union, in which the idea of states should be nearly annihilated." Yates was utterly opposed to "nationalism," and without impugning his sincerity, it may be said to be more than doubtful whether either Randolph or Pinckney declared themselves ready to "nearly annihilate" the states as such. Next day the convention in Committee of the Whole proceeded to take up the first of resolutions of Mr. Randolph, whereupon that gentleman, "upon the suggestion of Mr. G. Morris," as Madison puts it, moved its postponement in order to consider three other resolutions which he proceeded to read. Mr. Yates says that the "suggestion" by Mr. Morris was a remark to the effect that the resolution was unnecessary, as the other resolutions did not agree with it. The three highly significant resolutions now offered by Mr. Randolph were as follows:

1. *Resolved*, That a union of the states, merely federal, will not accomplish the objects proposed by the articles of confederation, namely, common defence, security of liberty, and general welfare.

2. *Resolved*, That no treaty or treaties among any of the states as sovereign will accomplish or secure their common defence, liberty, or welfare.

3. *Resolved*, That a national government ought to be established consisting of a supreme judicial, legislative, and executive.

As given by Mr. Madison (the above are from Yates) there are slight and unimportant verbal differences in them. With regard to the first resolution, according to Mr. Madison, some

verbal criticisms were made. Yates says that Mr. Pinckney observed that, if agreed to, the convention might as well adjourn, as its business was simply to amend or alter the articles of confederation. The second resolution being of the same character, both were passed over, and the third resolution was taken up, and provoked considerable discussion, "less, however," says Madison, "on its general merits than on the force and extent of the words 'supreme' and 'national.'" Mr. Pinckney inquired of Mr. Randolph, point blank, whether he meant to abolish the state governments, and was answered, according to Madison, that these general propositions were merely intended to introduce particular ones which would explain his proposed system; according to Yates, that such was not the intention, but merely that in case of clash between the powers to be granted to the new government with those of the states the latter were to give way.

Mr. Gouverneur Morris stated the difference between a "*federal*" and a "*national, supreme*" government to be that the former was a "mere compact resting on the good faith of the parties; the latter having a complete and *compulsive* operation." He added his conviction that in all communities there must be one supreme power and one only. He was immediately followed by Mr. Mason, who stated that coercion could not in the nature of things be executed on the states collectively, and that such a government was needed as could act against individuals, and punish only the guilty parties. Thus, at the outset, was the convention squarely told what were the ideas of those who favored the resolution and all that it implied; and they refused, though by a tie vote, to postpone this resolution for a less positive one offered by Mr. Read, that "a more effective government, consisting of a legislature, executive, and judiciary ought to be established."

Mr. Randolph's resolution was then passed by a vote of six "ayes" to one "no"—Connecticut. New York was divided—Hamilton, of course, "aye," Yates equally of course, "no." The second resolution of the "Virginia plan," viz., "That the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number

of free inhabitants, as the one or the other rule may seem best in different cases," was then taken up. But upon the objection of Mr. Read, of Delaware, owing to the clause in the Delaware credentials forbidding an agreement to proportionate representation, the resolution was postponed, with, however, a general understanding that it would certainly be agreed to in substance later. Mr. Madison had pointed out that "whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a national government should be put in place." The convention then, in Committee of the Whole, agreed to the third resolution, that the legislature should consist of two branches—Yates remarking in a note in his "minutes" that as a supreme legislature had been agreed upon, he saw no objection to its being in two branches; or in twenty, I presume—the whole proceeding was directly opposed to his views. Now came a most important resolution, a radical departure from the articles of confederation, the fourth in the plan, which provided for the election of the first branch of the National Legislature "by the people of the several states."

This was debated at some length, Mr. Gerry objecting strongly on the ground that the mass of the people were too ill-informed, too easily misled, to be trusted with such important powers. He said that the country was suffering from an excess of democracy—true enough before and since!—but hardly a reason for refusing a properly regulated franchise to the people. Messrs. Mason, Wilson and Madison all argued strenuously for the resolution, urging that the sympathy between the government and the people so essential to its permanence and efficacy could only be secured in this way.

This clause of the resolution passed by a vote of five ayes to two noes—two states, Connecticut and Delaware, being divided. The subject of the qualifications of the members of the National Legislature was postponed; the convention was now engaged with general propositions. They now proceeded to the fifth resolution, which provided for the election of the second "or senatorial" branch of the National Legislature by

the first branch, etc. The debate upon this resolution when first taken up showed, on the whole, an unwillingness to entrust such a power to the first branch, the majority of those who spoke appearing to think that the state legislatures ought to be entrusted with it. However, no affirmative action was taken; the resolution was simply negatived by a decisive vote, and a day or two later a motion to elect by the people of the states divided into districts was defeated. About a week afterwards, on June 7th, the subject was again taken up. Mr. Dickinson moved that the second branch be chosen by the legislature of the individual states, and proceeded to support his motion. In the debate which followed, participated in by several of the ablest men in the convention, it is not easy to see what was the reason for the unanimous vote with which the resolution finally passed. One suggestion, by Mr. Read, that this branch be appointed by the *executive* from persons nominated by the state legislatures was not even seconded, and was passed over in silent contempt. The real point at issue, however, was the question of proportionate representation. If this principle were carried out, it would have made the body too numerous, each state being allowed at least one. And there seems also to have been a feeling that it would not do to ignore too completely the states as political organisms in forming the new national government. And also, that a better class of men would be secured to the new senate, if the legislature and not the easily led people at large should elect its members. In the meantime, after failing to dispose of this question on May 31st, they proceeded to pass the sixth resolution (practically without debate, although Mr. Butler remarked that he feared they were going too far in taking away the powers of the states), except the clause authorizing the employment of force against a delinquent state. This was postponed after a few remarks by Madison, who said he doubted the wisdom or justice of the use of force against a people collectively. He thought that a union of states with such a provision would provide for its own destruction, and would probably be considered by the party attacked as "a dissolution of all previous compacts by which it might be

bound"—a very extraordinary position, it seems to me, for Mr. Madison to take. It is true, he did not ask for a rejection of the resolution, but merely a postponement of it in the hope that a "system would be framed which would render this resource unnecessary." Still, one of the capital defects in "confederation" system had been the powerlessness of Congress to enforce obedience to its behests. And how a *delinquent* state could regard the use of force against it as releasing it from any compact by which it might be bound, it is not easy to see. Mr. Madison says it would probably be regarded by the particular state as a declaration of war rather than an infliction of punishment, a point of view only comprehensible upon the theory that they were after all only engaged in the formation of a new league or close alliance between sovereign states, a position hardly reconcilable with the general tenor of the resolutions under consideration, or with the express words of the distinguished Virginian in the debate on proportionate representation before quoted, viz.: "Whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a national government should be put into the place."

*Lucius S. Landreth.*

(To be Continued.)



## A VIEW OF THE PAROL-EVIDENCE RULE.— PART III.

§ 12. *Same: Rule against disturbing a Clear Meaning.* It is often said that where a word or a phrase bears a single clear meaning or application, no showing will be allowed that the party or parties actually used it in a different sense; and that therefore no evidence of usage or circumstances tending to prove such a sense will be considered. This limitation finds expression in varying forms; sometimes, for example, it is said that outside circumstances may be considered to identify and apply the description, and if a single object is found which exactly fits the description, then that object alone will be taken as designated by the terms of the document; sometimes it is said that where no ambiguity exists, no facts showing a peculiar intent will be considered. These varying phrasings, however, seem to rest on the same general notion, that, where the literal terms of the document have a clear and precise significance according to general standards, then the process of appealing to the individual standard of party or parties making the document, and of showing the application or sense of the words to have been used by them peculiarly and differently from the ordinary or apparent one, will be prohibited. This attitude may be partly accounted for historically, as a survival of an early scholastic and narrow view of the limits of interpretation,<sup>1</sup> partly (in the American cases) by a misapplication of the preceding exclusionary rule about declarations of intention to the whole field of interpretative data.<sup>2</sup> But it will be seen that it can have no justification in principle. The object of interpretation, as already explained, is to discover and enforce the terms of the document in the sense employed by the party (if one only) or parties (if two or more); and it cannot mat-

<sup>1</sup> This history is fully expounded by Professor Thayer, *Preliminary Treatise*, 410, 445.

<sup>2</sup> Usually by treating that rule as equivalent to the exclusion of all "parol evidence" unless an "ambiguity" existed.

ter what other persons might have understood by the words, if the party himself has not used them in that significance. It may be difficult, in a given instance, to believe that the party did use them in a peculiar and (to others) unnatural sense, and the evidence may be in a given case insufficient to convince that he did; but if it can be shown beyond doubt that he did, then there is no legal reason why his sense and application of the words should not be enforced and why the data that show it should not be considered. "No amount of evidence," said Sir George Jessel, Master of the Rolls, in a well-known witticism, "would convince him that black was white;<sup>1</sup> but it is one thing not to be convinced by the evidence in a given case, and a very different thing not to listen to evidence at all or not to accept the consequences if the evidence does convince. The truth is that this rule about not disturbing a clear meaning, so far as it should have any recognition, ought to be (in the epigrammatic phrase of Lord Justice Bowen<sup>2</sup>) "not so much a canon of construction as a counsel of caution."

To-day this supposed rule has an anomalous standing. On the one hand, we find it frequently mentioned and occasionally enforced; on the other hand, we find rulings which clearly demonstrate that it has no necessary part and no established status in the law. (1) In the case of *wills*, it has been repudiated in several rulings which go to the extreme in illustrating the true process of interpretation, namely, that of finding and enforcing the sense-used by the testator, no matter what the sense obtaining among other persons; the possible result of this process is typified in Chief Justice Doe's summing up,<sup>3</sup> that "a person known to the testator as A. B., and to all others as C. D., may take a legacy given to A. B.;"<sup>4</sup> a fre-

<sup>1</sup> *Mitchell v. Henry*, 24 Sol. Journ. 690; 15 Ch. D. 181; the question was whether the term "white selvage" could be shown by trade usage to be applicable to an article which to ordinary observers was dark gray or black.

<sup>2</sup> *Re Jodrell*, 44 Ch. D. 590.

<sup>3</sup> *Tilton v. Amer. Bible Soc'y*, 60 N. H. 377.

<sup>4</sup> Some of the cases are as follows: *Ryall v. Hannam*, 10 Beav. 536 ("to Elizabeth Abbott, a natural daughter of E. A., of the parish of G., single woman, and who formerly lived in my service;" on data too

quent field for the process is in enforcing the testator's individual usage of terms which ordinarily have a fixed legal significance of a different purport.<sup>1</sup> On the other hand, there are many rulings in which the apparent or natural sense has been enforced, and no showing of the testator's individual and abnormal usage has been allowed.<sup>2</sup> (2) In the case of *contracts*

numerous to note here, this description was held to signify John, the natural son of E. A., then married); *Parsons v. Parsons*, 1 Ves. Jr. 266 (to his "brother Edward Parsons;" taken to apply to Samuel P., whom the testator had habitually called Edward; though there was a deceased brother Edward); *Beaumont v. Fell*, 2 P. Wms. 141 (to "Catharine Earnley;" interpreted to apply to one Gertrude Yardley); *Blundell v. Gladstone*, 11 Sim. 467, on appeal in 1 Phillips, 279 (particularly the opinion of Patteson, J.); *Powell v. Biddle*, 2 Dall. 70 (to "Samuel P., son of S. P., of the city of Philadelphia, carpenter;" S. P. had sons William and Samuel; the legacy was given to William, on the strength of the testator's usage as to the name); *Smith v. Kimball*, 62 N. H. 606 (to "Meredith Institution;" construed on the facts as applicable to the Kimball Union Academy of Meriden); *Ross v. Kiger*, 42 W. Va. 402 (similar to the preceding case).

<sup>1</sup> *Doe v. Beynon*, 12 A. & E. 431 (to "her three daughters;" application to illegitimate daughter, allowed to be evidence); *Grant v. Grant*, L. R. 5 C. P. 727, per Blackburn, J. ("my nephew, J. G.;" there were two such nephews, sons respectively of the testator's brother and of his wife's brother; the term was held applicable, by the testator's usage, to the latter); *Re Horner*, 37 C. H. D. 695 (to "my sister C., the wife of T. H.," and on her death, "among her children;" H. was only cohabiting with C., and the testator knew this; but his words were interpreted to signify C.'s illegitimate children); *Re Jodrell*, 44 Ch. D. 590 (to "relatives;" held to apply to "all those the testator had before treated as relatives," even including persons related through illegitimate children); *Robb's Estate*, 37 S. C. 19, 28, 39 (to "such persons as shall be entitled under the law;" the law did not recognize persons related through illegitimacy; but the testator's usage as applying the terms to such persons was admitted).

<sup>2</sup> *Stringer v. Gardiner*, 4 DeG. & J. 468 ("my said niece E. S.;" a niece E. S. had died before the date of the will; a granddaughter of this niece, also named E. S., was living; the description was applied to the former, by the present rule); *Dorin v. Dorin*, L. R. 7 H. L. 568 (to "our children;" not applied to two illegitimate children by a person married to the testator just before the making of the will, there being no children after the marriage; the legal meaning held, in defiance of common sense, to apply and to exclude those children); *Re Fish*, 1894, 2 Ch. 83 (to a "niece E. W.;" there was no such niece, but there was a legitimate and an illegitimate grandniece of the wife, each named E. W.; facts showing the applicability of the terms to the latter were excluded); *American*

and *deeds*, the standard of usage is changed, *i. e.*, it is the joint sense of the parties that it is to be sought;<sup>1</sup> but if it can be clearly discovered, in the shape of usage or express agreement, there is on principle no objection to it merely on the score that it varies, however widely, from the natural or common or legal sense of the terms. Such is the attitude of many courts.<sup>2</sup> But here also we find many rulings adopting the principle that a clear meaning cannot be overturned, by any express understanding or special usage.<sup>3</sup>

§ 13. *Same*: (3) *Rule Against Correcting a False Description*. A doctrine has obtained some footing in the United States that where a description does not apply exactly to any object, but applies partly to one or partly to another, no data at all

*Bible Soc'y v. Pratt*, 9 All. 109 ("Dedham Bank;" there was such a bank, but also a Dedham Institution for Savings; facts showing the applicability of the term to the latter were excluded); *Tucker v. Seaman's Aid Society*, 7 Met. 188 (to "the Seaman's Aid Society in the city of Boston;" there were two societies, one named as above, the other named the Seaman's Friend Society; the bequest given to the former, by the present rule); *Flora v. Anderson*, U. S. App., 67 Fed. 182.

<sup>1</sup> *Ante*, § 9, p. 438.

<sup>2</sup> *Mitchell v. Henry*, L. R. 15 Ch. D. 181 (stated *supra*, p. 684; James, L. J., said: "The question is not whether the selvage is white, but whether it is what the trade know as a white selvage"); *Cochran v. Retberg*, 3 Esp. 121 (vessel to pay "five guineas a day demurrage; custom not to reckon Sundays and holidays, held to prevail); *Com. v. Hobbs*, 140 Mass. 443 ("white arsenic," in fact colored with lamp-black, "still remained the substance known as white arsenic"); *Farnum v. R. Co.*, 66 N. H. 569 ("noiseless steam motor;" technical application to motors making some noise, allowed); *Read v. Tacoma Assoc.*, 2 Wash. 198 (deed running a line "west;" custom to run such lines a little north of west, admitted).

<sup>3</sup> *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221; *Harrison v. Tate*, 100 Ga. 383; *Armstrong v. Granite Co.*, Ill., 42 N. E. 186; *Allen v. Kingsbury*, 16 Pick. 238 ("evidence of usage is never to be received to overturn the words of a deed"); *Brackett v. Bartholomew*, 6 Met. 396; *Goode v. Riley*, 153 Mass. 585 ("You cannot prove a mere private convention between the parties to give language a different meaning from its common one. It would open too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the old South Church;" as to this, the sufficient answer is that the real significance of a large proportion of commercial cipher telegrams could then never be proved).

can be considered to interpret and apply the description to an object which would be sufficiently and correctly described if a part of the terms of the writing were omitted. This result seems to have been reached in part by the influence of the supposed rule (just explained) against disturbing a clear meaning, and in part by the influence of the Baconian phrases about ambiguities, *i. e.*, it is argued in such ruling that there is no ambiguity in such a case, and then it is assumed (forgetting that the excluding rule—*ante*, § 11—to which there is an exception for ambiguities or equivocations, affects merely declarations of intention) that, not merely declarations of intention, but all circumstances whatever, helping to interpret the description, are to be excluded.<sup>1</sup> There is no support on principle, or in orthodox precedent, for such a result; the process is merely that of applying or interpreting a description, and of perceiving, upon the comparison of the terms with an external object, that one or more terms are non-essential and superfluous, and that the remainder are vital and decisive indices of description. Thus, if a will gives property to “James Winchendon, native of Portland, Maine, husband of my daughter Sarah, carpenter by trade, and residing at No. 48 West Street, Jamesville,” and we find a person who fulfils all these terms except that he lives at No. 348 West Place, we may treat that term of the description as non-essential, and still be satisfied that a person fulfilling the other and essential terms is the one signified. This process, as including an examination of all the circumstances, a rejection of part of the description as superfluous, and an application of the remainder to an object fulfilling it, is correct on principle, whether it is as simple as in the above instance or more extensive and radical; the only question can be whether in a given instance the cir-

<sup>1</sup> This attitude is seen in the dissenting opinion in *Patch v. White*, 117 U. S. 210, cited *post*, where, after much reference to ambiguities, it is finally said: “If there is any proposition settled in the law of wills, it is that extrinsic evidence is inadmissible to show the intention of the testator, unless it be to explain a latent ambiguity;” here the real rule referred to is the rule excluding declarations of intention; and this unfortunate confusion of declarations of intention with all “extrinsic evidence” whatever is frequently found as the source of erroneous rulings.

cumstances sufficiently convince us that a certain part of the description may be rejected as non-essential and superfluous. This result has long been established in England.<sup>1</sup> In the United States no difficulty seems to have been experienced in cases other than wills of land containing erroneous descriptions. In deeds of land it seems to be generally accepted (according to the maxim, *falsa demonstratio non nocet*) that the process of ascertaining what terms (*e. g.*, courses and calls) may be rejected as non-essential, and of considering the circumstances for that purpose, is a proper one; the only limitation being that enough must remain to indicate the land with certainty.<sup>2</sup> Where a will is involved, a distinction may conceivably, though perhaps not properly, be taken between a will devising "all my land, to wit," followed by the description in question, and a will not so premising ownership; in the former case, if the description names "the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of sect. 36, t. 18, r. 10," and the testator owns no such land, but owns the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , then the whole description may be interpreted to read, omitting the first term as non-essential, "my land in the N. E.  $\frac{1}{4}$ ," etc., which is easily applied; in the latter case, there being no such preliminary term in the will, the description, omitting the first part, would

<sup>1</sup> Co. Litt. 3 a: "If lands be given to Robert, Earl of Pembroke, where his name is Henry, . . . in these and like cases there can be but one of that dignity or name, and therefore such a grant is good, albeit the name of baptism is mistaken;" *Goodtitle v. Southern*, 1 M. & S. 299 ("all my farm, lands, and hereditaments called T. farm, . . . now in the occupation of A. C.;" though two closes of T. farm were occupied by M., the whole was held to pass); *Doe v. Huthwaite*, 3 B. & Ald. 632 (to "G. H., eldest son of J. H., etc., in default, etc., to S. H., second son of J. H., etc., in default, etc., to J. H., third son of J. H.;" in fact, S. H. was third son and J. H. second son; circumstances considered to show which part of the description was essential); *Cowen v. Truefitt*, [1893] 2 Ch. 551 (deed of rooms on second floor of Nos. 13 and 14, Old Bond Street, with free ingress "through the staircase and passage of No. 13;" there was a staircase and passage in No. 14, but none in No. 13; the words "of No. 13" rejected as *falsa demonstratio*).

<sup>2</sup> See examples in *Fancher v. DeMontegre*, 1 Head, 40; *Higdon v. Rice*, 119 N. C. 623; *Davidson v. Shuler*, *ib.* 582, and cases cited; *New York L. I. Co. v. Aitkin*, 125 N. Y. 661; *Gordon v. Kitrell* (Miss.), 21 So. 922; *Rushton v. Hallett* (Utah), 30 Pac. 1014.

run, "the N. E.  $\frac{1}{4}$  of sect. 36," etc., which could not be enforced, because the testator does not own the whole N. E.  $\frac{1}{4}$ .<sup>1</sup> Thus we have a further distinction between rulings which regard it possible to imply such a term as "my land," where it is wanting, and rulings which regard such an implication as improper.<sup>2</sup> Of the general state of the rulings it may be said (1) that the process of ascertaining the non-essential terms, by considering all the circumstances and by applying the description with the omission of the non-essential terms, is in the United States almost everywhere treated (as it is in England) as proper; (2) that where it is necessary, in order to obtain a sufficient description, to imply into the will such a term as "land belonging to me," there are varying rulings

<sup>1</sup> The controversy has centered around the case of *Kurtz v. Hibner*, 55 Ill. 514; criticised by Judge Redfield, of Vermont, in 10 AMER. LAW REG. N. S. 93, and defended by Judge Caton, of Illinois, *ib.* 353, and by Julius Rosenthal, Esq., of Chicago, in Chicago Legal News, March 18, 1871. In that case, the devise was of "the west half of the southwest quarter of section 32, township 35, range 10, containing eighty acres;" it was offered to show, among other circumstances, that the testator owned only one 80-acre tract in township 35, but in section 33, and that by the draughtsman's mistake "32" had been written instead of "33;" and a similar showing was offered as to another bequest. The second part of this evidence (as to mistake) was rightly rejected, but the court excluded the first part also, and it is from this latter point of view that the ruling is to be questioned and has been the subject of controversy. The court laid stress on the fact that there were no other words in the will by which the description could be applied to section 33.

<sup>2</sup> The answer to the above suggestions seems to be that it is not necessary to imply any terms at all into the will; that the inquiry is merely what object the description as a whole signifies in the light of the circumstances; and that the circumstance of the testator's owning *e. g.* one-quarter section and not owning another may suffice to indicate that the description taken as a whole was applied to the former, even though it is not literally accurate in common usage. If there were a bequest to "James Ryder," and the testator's usage applied this name to Joseph Ryder, of Jamestown, it would be useless to argue that, by striking out the incorrect "James," the remaining "Ryder" could not be applied to that particular Ryder named Joseph because that would mean implying the word "Joseph" or "Jamestown" into the will; and yet the two arguments seem to rest on the same footing.



(in the few instances where the question has been raised), even by courts of the same jurisdiction.<sup>1</sup>

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<sup>1</sup> The question seems to have arisen chiefly in Illinois, Indiana, and Iowa, but in none of these jurisdictions, particularly in Illinois, are the successive rulings consistent: *Donehow v. Johnson*, 113 Ala. 126; *Kurtz v. Hibner*, 55 Ill. 514; *Bowen v. Allen*, 43 *id.* 53; *Bishop v. Morgan*, 82 *id.* 351 (the dissenting opinion of Dickey, J., is valuable); *Emmert v. Hayes*, 89 *id.* 16; *Decker v. Decker*, 121 *id.* 341 (practically overruling *Kurtz v. Hibner*); *Bingel v. Volz*, 142 *id.* 214 (following *Kurtz v. Hibner*); *Hallady v. Hess*, 147 *id.* 588; *Cleveland v. Spillman*, 25 Ind. 95; *Judy v. Gilbert*, 77 *id.* 96; *Funk v. Davis*, 112 *id.* 281; *Sturgis v. Work*, 122 *id.* 134; *Rook v. Wilson*, 142 *id.* 24; *Hartwig v. Schiefer*, 147 *id.* 64; *Fitzpatrick v. Fitzpatrick*, 36 Ia. 674; *Christy v. Badger*, 72 *id.* 581; *Covert v. Sebern*, 73 *id.* 564; *Eckford v. Eckford*, *id.*, 53 N. W. 344; *Wilson v. Stevens* (Kan.), 51 Pac. 903; *Riggs v. Myers*, 20 Mo. 239; *Gordon v. Burris*, 141 *id.* 602; *Winkley v. Kaime*, 32 N. H. 268 (useful case); *Jackson v. Sill*, 11 Johns. 201; *Scates v. Henderson*, 44 S. C. 548; *Minor v. Powers* (Tex.), 24 S. W. 710; *Patch v. White*, 117 U. S. 210; *Wildberger v. Cheek*, 94 Va. 517; *Ross v. Kiger*, 42 W. Va. 402.

From the above cases should be distinguished those in which a real equivocation exists, *e. g.* where a deed or will names "the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of sect. 10," but does not name range or township, county or state; here the description is equally and correctly applicable to several pieces of land, and the case is analogous to a bequest to "John Smith;" in such cases, even declarations of intention would be admissible (*ante*, § 11); and it is clear that at least the circumstances may be looked to in applying the equivocal description; see instances: *Hallady v. Hess*, 147 Ill. 588; *Ill. Cent. R. Co. v. LeBlanc*, 74 Miss. 650; *Ladnier v. Ladnier*, *id.*, 23 So. 430; and cases cited therein.

## PROGRESS OF THE LAW.

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### AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

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#### ADMIRALTY.

It is well known that extraordinary services on the part of a tug are necessary to bring its work under the head of salvage, and the case of *The Sir Robert Fernie*, 96 Fed. 348, is interesting as furnishing a set of facts which were held to constitute a salvage service. In that case a steel bark, with a valuable cargo, was moored to a buoy in Tacoma Harbor when, on a stormy night, the buoy's anchor chain parted and the vessel drifted broadside towards the shore. A tug, though shorthanded, came to her rescue and succeeded in saving her after five hours of incessant labor and peril. The tug and her crew were exposed to danger, and the tug's boiler and engines were considerably strained by her efforts.

An interesting opinion discussing the liability of ship owners for injuries to seamen caused by the negligence of the master is to be found in the case of *Olson v. Oregon Coal and Navigation Company*, 96 Fed. 109 (D. C., N. D. Cal.). In this case a seaman was injured by falling through a hatchway negligently left open by the master. The hatchway in itself was a proper one and no claim of negligence in the selection of the officers of the ship was made. It was held that the seaman and the master of the ship are fellow servants in all matters pertaining to the navigation of the ship, and a recovery was denied. The question is not free from doubt, but the authorities are carefully reviewed in the opinion and the better view seems to have been expressed.

In the case of *The Ethelred*, 96 Fed. 446 (D. C., E. D. Pa.), a libel *in rem* was filed for injuries sustained by a seaman who had been directed by the officer in charge to make use of a certain rope for his support while washing down the mast. The rope proved weak and broke under the libellant's weight, letting him fall to the deck. McPherson, J., sustained the libel, holding that there

**ADMIRALTY (Continued).**

had been negligence in failing to examine the rope which, being just aft of the funnel, was exposed to smoke and heat, and occasionally to sparks or flames.

The court evidently regarded this failure of the officers to inspect, and the consequent providing for the seaman of unsafe appliances, as the act or the owner of the vessel. How does this case square with the general rule laid down in *Olson v. Navigation Co., supra*? Is the rule which is to be extracted from these cases, as follows: When the master and the seamen are working together in the ordinary navigation of the ship, they are fellow servants; but when the master orders a seaman to perform a distinct duty, he is to be regarded as a vice-principal?

The power of a captain of a ship has always been of necessity quite arbitrary, and it is held in a recent case that where  
**Seamen,** there is no proof of malice or excessive punish-  
**Obedience** ment he will not be held liable for assault and battery when he uses physical force to compel prompt obedience to his orders: *Stout v. Weedin*, 95 Fed. 1001 (D. C., Wash.).

In *The Escanaba*, 96 Fed. 252 (D. C., N. D. Ill.), Judge Kohlsaatt has applied the rule giving priority to the lien which  
**Liens,** is later in time, to a case where the conflict was  
**Priority** between the claims of shippers for goods lost by the tort of the master and liens for supplies furnished prior to the tort.

**BANKRUPTCY.**

The application of the bankrupt in question for his discharge was opposed on the ground that he had made a false oath in  
**Discharge,** swearing that he had no assets, when in fact he  
**False Oath,** had, four months previous to the commencement  
**Concealment** of the proceedings, transferred a large stock of  
**of Assets** goods to his wife. Toulmin, Dist. Judge, held that while the transfer was void as to creditors and might be set aside by the trustee in bankruptcy, yet it was valid in regard to the bankrupt himself and did not amount to such an intentional fraud as would deprive the bankrupt of his discharge. The same was held of an omission, probably through oversight, of a certain debt in the bankrupt's schedule of liabilities: *In re Crenshaw*, 95 Fed. 632.

**BANKRUPTCY (Continued).**

What is the status of a debt which the bankrupt includes in his schedule, but which has been barred by the statute of limitations? Such was the question certified to the District Court (D. Minn.) by the referee in bankruptcy in *In Re Resler*, 95 Fed. 804. Counsel for the proving creditor strongly urged that even if the barred debt was not provable,—on which point the authorities cited seemed to be in great conflict,—yet the inclusion of the debt in the bankrupt's schedule was a clear waiver of the objection that the statute had run, and from such waiver and the written acknowledgment a promise was implied to pay the creditor. However, Judge Lochren disallowed the claim, but some expressions in his short opinion seem rather to confine its effect to cases arising in Minnesota.

It would seem unnecessary to decide that a person's oath before a referee in bankruptcy will not have the effect of depriving him of a right guaranteed him by the constitution. Yet in *In Re Scott*, 95 Fed. 815, the bankrupt possessed such a tender conscience that he refused to take the oath required by § 7 before the referee, unless there was added the proviso, "Reserving, however, the right to claim any lawful privilege as against or in relation to any question upon any examination." It seemed that the bankrupt was afraid that he would bind himself to give an answer to a question liable to incriminate himself, contrary to the fifth amendment. Judge Buffington properly decided that the bankrupt should have taken the oath in the original form; that the constitution of the United States was sufficiently strong to make implied exceptions of matters which it prohibited; and it would be time enough for the bankrupt to raise the objection when he was asked a question infringing upon his constitutional privilege.

The District Court (N. D. Mass.) has decided that where a husband, who is entitled to curtesy in the land of his wife, is placed in bankruptcy during the life of his wife, his curtesy does not pass to the trustee, since it is not property which he can convey or assign. Nor is it a "power" within § 70 (3) of the act which provides for the vesting in the trustee of all "powers" which the bankrupt might have exercised for his own benefit: *Hesseltine v. Prince*, 95 Fed. 802.

## BANKS AND BANKING.

*Quin v. Earle*, 95 Fed. 728, one of the many cases growing out of the failure of the Chestnut Street National Bank of Philadelphia, will be of interest to the many depositors in that institution. A bill was filed against the receiver of the bank, averring that the bank closed its doors at 3 P. M. on December 22, 1897, that within an hour prior to that time the complainant had made a deposit, and that, when the deposit was received, the bank's officers knew that it was hopelessly insolvent. The complainant, therefore, prayed to have his deposit declared a trust fund. The Circuit Court (E. D. Penna.), in an opinion by Judge Gray, while admitting that the above result would follow if complainant's premises were correct, yet, after a thorough examination of the evidence, decided that even up to 10 P. M. on December 22, 1897, there was no proof that the bank's officers considered it hopelessly insolvent, since they had hopes that it would receive outside assistance on December 23d, and the mere fact that the bank was in embarrassed circumstances at the time of the deposit was insufficient to warrant the creation of a trust. This decision, unless it is reversed, will probably block off a number of suits by depositors of December 22, 1897, who hope in this way to gain an advantage over their fellow-sufferers.

Deposit in  
Insolvent  
Bank,  
Knowledge  
of Officers

The president of the defendant bank had disappeared with funds of the bank, supposedly, in his possession. The cashier of the bank promised the plaintiff that if the latter would find the president, the bank would honor plaintiff's check for a certain amount. In an action against the bank for failure to honor the check, it was held, that under the circumstances the cashier had sufficient authority to bind the bank in this matter, and that there was a consideration for the check in the advantage which the bank would gain by the discovery of its president: *Valdetero v. Citizens' Bank*, 26 So. (La.) 425.

Promise by  
Cashier to  
Honor Check

## CONSTITUTIONAL LAW.

Encouraged, perhaps, by the frequency with which federal courts grant injunctions, the complainant in *Kiernan v. Multnomah County*, 95 Fed. 849, actually went into the federal court to obtain an injunction against the sheriff of his own county, on the ground that the sheriff had levied upon his property under

Due Process  
of Law,  
Illegal Levy  
of Property

## CONSTITUTIONAL LAW (Continued).

unauthorized proceedings, and that, therefore, the act of the sheriff was a deprivation of complainant's property without due process of law, contrary to the fourteenth amendment! Judge Bellinger, of the Circuit Court (N. D. Oregon), disappointed the complainant, by informing him, in a short opinion, that the fourteenth amendment was levelled at the states and not at individuals, "otherwise every invasion of the rights of one person by another would be cognizable in the federal courts under this amendment."

## CORPORATIONS.

The Supreme Court of the United States has given another instance of the extreme rigor with which it applies the doctrine of *ultra vires* in corporation cases without regard to the equities of each particular case. In *Nat. Bank v. Hawkins*, 19 Sup. Ct. 739, it appeared that the A. national bank held stock of the B. national bank and collected the dividends regularly, as the registered owner. On the failure of the B. bank, its receiver brought an action against the A. bank to recover the statutory assessment on the stock. He obtained a judgment in the Circuit Court, which was affirmed by the Circuit Court of Appeals (33 U. S. App. 747, 24 C. C. A. 444), from which a writ of error was taken to the Supreme Court.

The opinion, by Justice Shiras, consistently follows the extreme view which the Supreme Court has always taken on the subject of corporate power, or rather, lack of corporate power. After citing *Bank v. Kennedy*, 167 U. S. 362, to show that a national bank does not possess the power to hold stock of another national bank, he explains that the Circuit Court of Appeals was in error by reason of its failure to observe the distinction between the power of a national bank to purchase stock for an investment and its power to hold it merely as collateral security; the power exists in the latter instance, but is absent in the former. A determined effort was made by counsel to persuade the court that the A. bank, by receiving the dividends and partaking of the advantages of the transaction, was estopped from setting up its own lack of power when a legitimate burden was about to be cast upon it. But the court said that it had never recognized any such doctrine in regard to cases involving corporate power, quoting

## CORPORATIONS (Continued).

the decisive words of Justice Gray on this subject in *Cent. Trans. Co. v. Pull. Pal. Car Co.*, 139 U. S. 24.

The doctrine of immunity from estoppel, just mentioned, is applied by the Supreme Court of the United States only to acts *ultra vires* of the corporation itself and not to acts of officers of the corporation which are irregular in that they have not received the actual consent of the corporation. Thus in *Louisville, etc., Rwy. Co. v. Louisville Trust Co.*, 10 Sup. Ct. 817, a corporation had guaranteed certain negotiable bonds of another corporation. In a suit on the guarantee by a *bona fide* holder of the bonds, the defence set up was that the guarantee was void for want of the assent of a majority of the defendant's stockholders. In holding that defendant was estopped from setting up the defence, Justice Gray clearly marks the distinction between irregular acts wholly within the corporate power and acts *ultra vires*, relying principally on *Zabriskie v. R. R. Co.*, 23 How. 381, and *St. Louis, etc., Rwy. Co. v. Terre Haute, etc., Rwy. Co.*, 145 U. S. 393.

## DAMAGES.

The Supreme Court of Alabama, following *Ginna v R. R.*, 8 Hun, 494, has decided that where a person receives an injury to his hand through the negligence of another, by reason of which blood poisoning sets in, resulting in death, the death may be considered the proximate result of the injury, even though the blood poisoning has not made its appearance until some time after the injury. It is not of importance that such a result does not generally follow wounds of this character, nor is it incumbent upon the person injured to show that he received the germs of the blood poison in the accident: *Armstrong v. Montgomery St. Rwy. Co.*, 26 So. 349.

## EVIDENCE.

A., who was indicted for adultery committed with B., failed to call B. as a witness at the trial. In his closing argument, the prosecuting attorney commented on this fact, relying upon the rule that if a party has a witness possessing peculiar knowledge of the transaction and supposed to be favorable to him, and he fails to produce such witness when he has the means of doing so,



## EVIDENCE (Continued).

this, in the absence of all explanation, is ground for suspicion against the defendant that such better informed testimony would make against him. On appeal, the Supreme Court of Alabama (Tyson, J., dissenting), held that the above rule did not apply to this case, since, even if B. had been called, he could not have been forced to divulge facts tending to incriminate himself. The action of the district attorney was therefore held error: *State v. Brock*, 26 So. 329.

In an indictment for rape, in order to prove that the prosecutrix was under the age of sixteen, the prosecution offered, "Honesty," and the court admitted in evidence, a written certificate of baptism in which the clergyman had given the date of the prosecutrix. This was held, error, by the Supreme Court of New Jersey: *State v. Snover*, 43 Atl. 1059.

The defendant's counsel offered to ask a witness, "Do you know what is his [defendant's] reputation for morality, virtue and honesty in living?" The prosecution objected on the ground that, while evidence of defendant's general character was relevant, yet no evidence of defendant's specific character on any subject was admissible except upon the subject referred to in the indictment; that evidence of defendant's "honesty" could refer only to his financial probity and was therefore irrelevant, for the only subject upon which specific evidence of character could be given was that of defendant's sexual laxity. The court held that the question should have permitted, since, under the circumstances, the word, "honesty," imported chastity and was equivalent to "sexual morality;" citing authorities including Chaucer and Shakespeare.

## HUSBAND AND WIFE.

*Brown's Appeal*, 44 Atl. 22, presented a remarkable state of facts. The husband, A., was divorced from his wife, B., the latter being the innocent party. A. subsequently married C., from whom he was also divorced, C. being the innocent party. A. then married D., who survived him as his lawful wife. Both B. and C. had remarried after their divorces from A. On A.'s death, B. and C. claimed dower in his land under Conn. Gen. St. (1877), § 618, which provide that a divorced wife, who is the innocent party and shall survive her husband, shall have one-third of his real estate for life.

Divorce,  
Effect on  
Dower Right,  
Remarriage

**HUSBAND AND WIFE (Continued).**

The Supreme Court of Connecticut, in a rambling opinion, decided that, under the circumstances, the true intent of the statute did not give B. and C. rights of dower, since A. had left a lawful wife surviving him. In reaching this conclusion the court relied largely on the Act of 1849 (p. 274), which allowed a divorced person to marry again. The argument of the court seems to be that since, under the Act of 1849, a man may leave a lawful wife surviving him, as he did in this case, the Act of 1877 could not have been intended to apply here, since, if B. and C. could have claimed dower, they could not have interfered with D.'s undoubted right of dower, and the result would be that three persons would be allowed dower on the ground that each was A.'s wife at the time of his death. Moreover, the court construes the Act of 1877 as admitting a woman to dower "only because she represents, and no other is, the wife living with her husband, or separate through his fault." Of course, with D. surviving, neither B. nor C. could be said to be in such a position.

The question naturally asserts itself: Was it the fact of A.'s remarriage that cut off B. and C., or was it the fact that D. survived A.? In other words, if D. had died before A., would B.'s and C.'s rights have been any different? The court refuses to commit itself on this point, but would seem not indisposed to lay down the rule that the mere fact of remarriage after divorce is of itself sufficient to oust the divorcee's rights: "If, upon marriage after divorce, the link between the wife and her divorced husband which supports her claim to dower is finally severed, no troublesome questions will arise, no matter how many times a man is divorced; otherwise such questions as have been discussed in this case may arise whenever a man dies, leaving more than one divorced widow and no genuine widow. . . . But they [these questions] are not likely to become practical. Such a case as this has never been presented to this court, and it is to be hoped that it may never arise again."

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**INSURANCE.**

The Supreme Court of Massachusetts has decided that an insurance company waived its rights to demand proofs of loss, according to the policy, under the following circumstances: After the fire plaintiff notified the general agent of the company, who said that D., an adjuster, would attend to the matter. D., having been sent from the office of the company, viewed the premises with the plaintiff

**INSURANCE (Continued).**

and suggested that the amount of the loss should be determined by one F. The latter, a few days afterwards, handed his figures to D., but nothing more was done by any of the parties. The court, in holding that the above facts constituted a waiver of the proofs of loss, mentioned *Everett v. Ins. Co.*, 142 Pa. 332, as a case *contra* to the above decision. It would not seem that *Everett v. Ins. Co.* decided anything different, for in that case the decision was expressly based upon the fact that, as Justice Mitchell said in his opinion, no evidence of authority appeared whereby the adjusters could waive any provisions in the policy, while in the case at bar the court said that the fact that D. was sent by the company itself in reply to a letter to the general office was sufficient evidence of his authority to act on behalf of the company: *Wholly v. Western Assurance Co.*, 54 N. E. 548.

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**JUSTICES OF THE PEACE.**

The Vermont statute on the subject of justices of the peace (V. S. § 1040) provides that the justices shall have jurisdiction "where the debt or other matter in demand does not exceed \$200." An action was brought before a justice on a judgment of \$249.15, on which a certain amount had been collected, so that the balance remaining due was \$145.52. It was urged on behalf of the defendant that the test of the jurisdiction was the amount of the judgment, but the Supreme Court of Vermont properly held that the amount really involved was \$145.52, and allowed jurisdiction: *Page v. Warner*, 44 Atl. 67.

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**NEGLIGENCE.**

The Supreme Court of Ohio has lately had occasion to apply and extend the doctrine of *Fletcher v. Rylands*, L. R. 3, H. L. 330. In the case before it, *Bradford Glycerine Co. v. St. Mary's Mfg. Co.*, 54 N. E. 528, the facts showed that the defendant was the owner of a magazine and contents, containing about fifty quarts of nitroglycerine, situated about a mile from plaintiff's property and separated from it by the lands of several persons. While one of the defendant's servants was placing some nitroglycerine in the magazine it exploded with great force, causing vibrations in the atmosphere sufficient in power and violence to shatter the glass

## NEGLIGENCE (Continued).

windows of plaintiff's buildings. Plaintiff was unable to show that the defendant's servant was in any way negligent in handling the nitroglycerine, but he claimed the application of the doctrine of *res ipsa loquitur*.

In support of his contention, plaintiff cited the cases of *Tiffin v. McCormack*, 34 Ohio St. 638, and *Hay v. Cohoes Co.*, 2 N. Y. 159, which illustrate the well-recognized doctrine that, where one, in blasting rocks on his own land, casts fragments on the land of another, causing injury, it is no defense to show that ordinary care has been taken in the working of the blast. Counsel for defendant contended that these cases were not in point, since in the one case the damage was caused by fragments of rock being hurled upon or against the property injured, while in the other case nothing was thrown upon the property, but the injury occurred through the medium of the atmosphere—something that was not to be naturally expected. However, the court very sensibly decided that the manner of the injury was immaterial to fix the liability, which latter was established in respect to plaintiff's property by the mere fact of the explosion.

It was then strongly contended on behalf of the defendant that, since no presumption of negligence arises from the mere fact that a steam boiler explodes, to the injury of an adjoining property—see *Marshall v. Welwood*, 38 N. J. L. 339; *Losee v. Buchanan*, 51 N. Y. 476—there was no reason for applying the doctrine of *Fletcher v. Rylands* to the case of carefully-stored nitroglycerine. The court said that the reason for making the distinction was that steam engines and boilers are, at the present day, in so common use and attended with so little danger to the neighboring properties that they cannot be said to constitute nuisances *per se*. Not so, however, with a magazine of nitroglycerine. The existence of a manufacturing plant is often attended with the rise in value of neighboring properties, while the presence of nitroglycerine can have no other than a disastrous effect with such values. The one is an ordinary, the other is an extraordinary, use of property.

Finally, the court disposes of the argument that the liability for the explosion was confined to the adjacent properties by stating that the rule of *Fletcher v. Rylands* includes all injuries "within the lines of the danger," and the lines of the danger in this case were fixed only by the limits of the atmospheric vibrations' ability to injury property. The opinion in this case, by Bradbury, C. J., well repays a reading, since the question, now a comparatively new one, will probably arise often in the

**NEGLIGENCE (Continued).**

future, and the law on the subject is collated in a remarkably able manner. Shauck, J., dissented, but delivered no opinion.

**PARTNERSHIP.**

It is provided by the Special Partnership Act of Michigan (How. Ann. Stat. § 2348) that, at the time of the formation of the special partnership, one or more of the general partners shall file an affidavit stating that the special partner has paid in his requisite amount "in money or other property at cash value." In *Chick v. Robinson*, 95 Fed. 619, a creditor of the partnership attempted to hold the special partner to the liability of a general partner on the ground that the contribution of the special partner had been made, not in money, but by a check, which check, however, had been honored on presentation.

The Circuit Court of Appeals for the Sixth Circuit, while admitting that many courts hold a special partner to the very strictest compliance with the words of the statute in order to shield him from general liability—see *Haggerty v. Foster*, 103 Mass. 17—nevertheless held that a check, filed in good faith, and which has been subsequently honored, comes within the intendment of the above section. "Doubtless the weight of authority in the construction of limited partnership statutes is to the contrary; but, as already said, the trend of modern cases is towards a more liberal and sensible view of such statutory requirements. Their purpose is to secure the actual payment of the money into the capital of the firm, and, failing that, to hold the partner to a general liability. It seems to us that our construction of the statute secures this end, and it does not entrap the honest and unwary into unexpected liabilities by enforcing a stricter rule as to what are cash payments than obtains in the commercial community." Per Taft, J.

**SALES.**

The Supreme Court of New Hampshire has enforced strictly the rule of law which requires a sale of personal property to be accompanied by an open and notorious change of possession, in order to be effective against the creditors of the vendor. Thus, in *Janelli v. Denoncour*, 44 Atl. 62, which was an action against a sheriff for levying on a kiln of bricks as the property of B., which A., the plaintiff, claimed to have been previously sold to him by B., it appeared that A. had recorded

**SALES (Continued).**

the bill of sale in the office of the town clerk on the day of the sale; that B.'s wife had given A. permission to allow the bricks to remain in B.'s yard; and that A. had sent his servant at night to cover the bricks with a cloth. None of these facts were held to afford A. any claim against the creditor of B. making the levy, since (1) the recording of the bill of sale, not being required by law, was no notice to creditors, (2) the permission given by B.'s wife was of no avail, since B.'s wife did not own the yard, and (3) the covering of the bricks by A.'s servant at night was not an open and visible assertion of property in them by A.

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**STATUTES.**

The Bankruptcy Act of July 1, 1898 (30 Stat. 544), provides that "this act shall go into full force and effect upon its passage, . . . and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof." In *Carriage Co. v. Stengel*, 95 Fed. 641, where a petition for involuntary bankruptcy had been filed November 1, 1898, the court was asked to take judicial notice of the exact hour and minute on July 1, 1898, when the act went into effect. This the Circuit Court of Appeals for the Sixth Circuit declined to do, Judge Taft saying that they would follow the ordinary presumption that a statute takes effect from the first minute of the day on which it is passed; that a court should abandon the presumption and receive evidence of the exact time at which a statute is passed only when the application of the presumption would impart a harsh and retroactive effect to the statute. The proceedings before the court were therefore upheld.

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**SURVIVAL OF ACTIONS.**

The exact nature of a widow's right of action for the death of her husband, caused by negligence, has been the subject of much discussion. It seems that in the state of Washington a carrier may lawfully contract for freedom from liability for negligence resulting in injury to a person carried on a free pass. In *Adams v. Northern Pac. Rwy. Co.*, 95 Fed. 939, the question was whether or not such a contract barred the right of the widow of the person carried, given under a statute based on Lord Campbell's Act. Following the rule adopted

Action by  
Widow for  
Death of  
Husband,  
Act of Hus-  
band as Bar

## SURVIVAL OF ACTIONS (Continued).

by the Supreme Court of the United States and many jurisdictions, the Circuit Court (E. D. Wash.) held that the right of the widow was entirely separate from the right which the husband might have, and therefore his contract with the railroad did not constitute a bar to his action. The contrary view has been adopted in Pennsylvania.

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WILLS.

In Alabama there is the usual statute providing that every devise of land shall be construed as a devise in fee, unless a contrary intention appears. In *Johnson v. Land Co.*, 26 So. 360, the devise was "to A. for life, and after her death to her children. Should she, however, die without children, I give at her death to B." It was urged that B. was to take only upon the event of surviving A., but the Supreme Court of Mississippi held that there was not sufficient evidence to take it without the statute, and that the devise should be read to B. and his heirs.

The testator in this will left his son, J., "one dollar, and no more." There was no residuary clause in the will, and the testator left a piece of land undisposed of by the will. In an action to determine whether or not J. should have a share in the undevised land, it was argued that the evident intention of the testator was that J. should have nothing more than his dollar from the whole estate, and so the intention probably was, but the Supreme Court of New Hampshire restricted the effect of the words, "and no more," to the property left by the will, and allowed J. to share in the undevised land: *Wells v. Anderson*, 44 Atl. 103.



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REWARD TO PUBLIC OFFICERS; PUBLIC POLICY; EXCEPTION TO THE COMMON LAW RULE. The general rule of common law that it is against public policy to permit a public official to recover a reward for doing any act which he should have done in the ordinary course of his duty is well known. Originating in England—*Bridge v. Cage*, Cro. Jac. 103 (1654)—it has been repeatedly affirmed in this country: *In Re Russell*, 51 Conn. 577 (1884); *Pool v. Boston*, 5 Cush. (Mass.) 219 (1849); *Pilie v. New Orleans*, 19 La. Ann. 274 (1867).

A case which involved this doctrine was decided in the Supreme Court of the United States in March, 1899. In *Matthews v. The United States*, 173 U. S. 381, 19 Sup. Ct. Rep. 413, certain circumstances were present which, in the minds of the majority of the

court, removed the case from the general rule of the common law above mentioned, and necessitated the establishment of certain exceptions to it.

*Matthews v. The United States* arose in the Court of Claims (32 Ct. Cl. 123). The two plaintiffs were, one a regular, and the other a specially appointed deputy marshal. The Sundry Civil Appropriation Act of 1891 had appropriated money for the prosecution of crimes against the United States. The present plaintiffs claimed a reward offered under this act by the Attorney-General of the United States for the arrest and conviction of a man who had murdered a revenue officer in Florida. Their efforts resulted in the arrest and conviction of the criminal. Payment of the reward was refused by the Attorney-General and this action was brought in the Court of Claims. That court found for the plaintiffs mainly on two grounds: (1) that as a deputy is employed and paid by the marshal and not directly by the United States, he is not such an officer of the United States as is by law prohibited from receiving any reward beyond his salary; (2) that "a deputy is not an officer upon whom, as such, the law places any official duty," nor is he "the prescribed official agency of the Government for making arrests, like a constable or police officer."

On appeal to the Supreme Court, the United States relied for reversal solely on two propositions: 1. That as at common law it was against public policy to allow an officer to receive a reward for doing his legal duty, therefore the statute under which the Attorney-General acted, and the offer made by him should be so construed as to exclude the right of the plaintiffs, who were under a duty to make arrests, to the reward; 2. That even if otherwise the deputies might take the reward, they were incapacitated because of the general statute forbidding officers in any branch of the public service from receiving any additional pay in any form whatever (Rev. Stat. § 1765), and because of the further provision that no civil officer shall receive any compensation from the Treasury of the United States beyond his salary (18 Stat. 85, 109).

The majority opinion of the court was delivered by Mr. Justice White. It was briefly as follows: The first contention of the United States amounts to this, that although the Appropriation Act vested entire discretion in the Attorney-General as to those whom he would include in his offer of a reward, and although he exercised his right by including all persons whether or not they were officers, yet it is the duty of the court to read into the statute on the ground of public policy, a qualification which it does not contain, that employes of the Government are excluded from participating in the offered reward. This is to ask the judicial power to exert a discretion not vested in it, but lodged by the law-making power in a different branch of the Government. Further, the contention that it is against public policy in all cases to enforce, in favor of a public officer, a contract by which he claims to receive an offered reward for doing his duty, is unwarranted. It is only against public policy

when the reward is offered by a *private individual*. But there is a broad difference where the reward is expressly authorized by competent legislative authority. Further, by examining the past action of Congress on similar occasions, it becomes clear that rewards have often been allowed to public officers. As the Attorney-General chose not to exclude in his offer deputy marshals, it is not necessary to determine whether the plaintiffs are officers of the United States within the meaning of the Statute cited. The Appropriation Act being a special and later enactment operates necessarily to engraft upon the prior and general statute an exception to the extent of the power conferred on the Attorney-General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the later act. The judgment of the Court of Claims is affirmed. Mr. Justice Brown arrived at the same conclusion, but dissented from the argument. Justices Harlan and Peckham dissented from the conclusion on the ground that such a payment was contrary to public policy and not authorized by the Appropriation Act.

The question presented by the principal case has often come before the courts of the United States and of the separate states. The decisions are not in perfect accord. One of the earliest cases is *Pool v. City of Boston*, 5 Cush. 219, decided in 1849. There the Supreme Court of Massachusetts held that a promise of a reward offered by the Mayor of Boston for the detection of incendiaries would not be enforced in favor of the plaintiff, a duly appointed watchman, because there is no consideration for a contract to do one's legal duty. The United States Supreme Court in *Matthews v. The United States*, distinguishes that case from *Pool v. Boston*, where the facts are practically the same, on the ground that while the city had power to offer a reward, yet no legislative act had intrusted the municipal authorities with the discretion of including in such an offer officers whose official duty it was to aid in the detection of criminals. In *Railway Company v. Grafton*, 51 Ark. 504 (1889), the court held that the plaintiffs were not entitled to recover a reward offered by the Railway Company for the apprehension of any one caught tampering with the railroad switches during a strike. Plaintiffs were acting as a *posse comitatus* under the direct supervision of the sheriff when they made the arrests in question, and the court decided that they could not be heard to say that although under the direct command of the sheriff, they had acted independently of him; and on the broad grounds of public policy that a public officer, or those called to aid him, cannot recover any extra reward for doing what is but their legal duty, their claim was disallowed.

*Spinney v. The United States* and *Lees v. Colgan* are two cases very close to the principal case. In the former, decided in 1897 (32 Ct. Cl. 397), a postmaster, whose office had been robbed, secured the conviction of the burglars and claimed the reward offered by the Postmaster General under a Congressional Appropriation Act. The court held that the postmaster was a public

officer; and on grounds of public policy should not be allowed to receive rewards for doing his duty in securing the safety of the mails. The court distinguished this case from *Matthews v. The United States* on the ground that there no duty devolved by law upon the deputy marshals as such, while such a duty did devolve upon the postmaster.

In conclusion let us note a case where the court came to the opposite conclusion from that reached in *Matthews v. The United States*. *Lees v. Colgan*, 120 Cal. 262, decided in 1898, is very similar to the principal case which was decided only a year later. Colgan was a captain of police in San Francisco. The Governor of California, acting under a section of the penal code which authorized the offering of rewards for the apprehension of criminals, proclaimed a reward for the arrest of certain persons who had committed a murder. Colgan apprehended the men and claimed the reward, which was refused on the ground that his legal duty required him to act as he had. The court, through Garrouette, J., affirmed the judgment of the lower court on the ground that it was against public policy to allow such a reward. "No appellate court," said the learned judge, "has declared the existence in principle of any well defined distinction as to public officers, in cases where rewards have been offered by the state or municipality, and where rewards have been offered by private parties." The statute did not specifically include peace officers, and the implication cannot be made that it is meant to include such persons when it has been declared a vicious public policy elsewhere. To take such a step the interest must be plainly manifest.

On this subject see, also, *Smith v. Whildin*, 10 Pa. 39; *Davies v. Burns*, 5 Allen, 349; *Pilie v. New Orleans*, 19 La. Ann. 274; *Harris v. More*, 70 Cal. 503; *Harris v. Beaven*, 11 Bush, 254. These cases together with those noted above outline the trend of judicial opinions in this country. As the matter has now come before the Supreme Court, we may consider the question settled as laid down in the majority opinion in *Matthews v. The United States*.

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**SURFACE WATERS; ADJOINING PROPERTIES; RIGHT OF LOWER OWNER TO PREVENT THE FLOW FROM UPPER PROPERTY.** In *Lampe v. City of San Francisco*, 57 Pac. 461 (May 31, 1899), a property owner in the city of San Francisco brought an action against the city, averring in his complaint that he was the owner of land abutting on a street; that the surface waters from his land had been accustomed to drain into the street; that the city raised the level of the street; and that, in consequence of such change of level, the surface waters were backed up over plaintiff's land, causing damage. A demurrer to plaintiff's complaint was sustained by the Superior Court of California, and, on appeal to the Supreme Court, the judgment was

affirmed on the ground that plaintiff had no vested right to have an outlet for his surface water over the adjoining street.

The right which plaintiff claimed in the above case falls within that diversion of the law of Easements entitled "Natural Easements," or "Natural Servitudes." Mr. Addison says of them in his work on Torts (p. 271) that they are "derived from the situation of places and are a natural and necessary adjunct to the property to which they are annexed. . . . The right and burden of natural servitudes are contemporaneous with the right of property itself." Among these natural servitudes he mentions the servitude of surface drainage from an upper property to a lower one, and he explains its existence upon the ground that the upper land cannot be cultivated or enjoyed unless the surface water is allowed to escape over the lower.

The rule that the upper owner possesses the easement of surface drainage was fully recognized by the Roman Law. In *Martin v. Riddle*, 26 Pa. 415, Justice Lowrie said, "I shall now speak of the general principles of the law in the matter of rain water and drainage, and of the respective rights and duties of adjoining proprietors in relation thereto. . . . Not readily finding the subject treated of in any of our usual books of reference, I venture to extract the law from books of a foreign origin.—Corp. Jur. Civ., 39, 3, 1, and 43, 21; Code Nap. § 640; Pothier, *du Voisinage*;" the authorities supporting the proposition that the servitude exists. Also in *Kauffman v. Greisemer*, 26 Pa. 413, the Supreme Court of Pennsylvania quotes Pardessus on the Civil Code to the same effect.

In America the civil law rule has found the greatest favor among the agricultural states of the west, where the huge grain fields would be utterly ruined, were the owners of the adjoining properties at liberty to raise the surface of their ground without providing for the escape of the water, converting the fields into lakes whenever a heavy rain should fall. Thus in *Wharton v. Stevens*, 84 Iowa, 107, the Supreme Court of Iowa went so far as to declare that, "It would be a bold counsel who would advocate, and a bold court which would decide that water from rains and falling snows, which are called by counsel, "surface water," when it finds swales provided by nature to bear it away, may be arrested in its natural course and made to flow back again upon the land which these swales are intended to drain. The effect of such a decision would be stupendous. It would subject millions of acres of the best agricultural lands to destruction. . . . This court is not prepared to recognize a rule so detrimental to the interests of the state and in conflict with sound legal principles and precedent." See also *Boyd v. Conklin*, 54 Mich. 583, and *Gormley v. Sandford*, 52 Ill. 158, in which latter case the principles applicable to running streams are held to govern the case of surface water. "As water must flow, and some rule in regard to it must be established where land is held under artificial titles created by human laws, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws."

On the other hand, several of the eastern courts have laid down what they term the "common law rule," to the effect that, as the owner of property has the right to improve it as he sees fit, he cannot be prevented from raising its level, and the mere fact that such change of level blocks the flow of surface water from an upper property and causes the water to collect on the latter affords no right of action by the upper owner, but is *damnum absque injuria*. The leading authorities in support of this proposition are *Gannon v. Hargadon*, 10 Allen (Mass.), 105; *Barkley v. Wilcox*, 86 N. Y. 140; *Bassett v. Salisbury Co.*, 43 N. H. 569; *Bowlsby v. Spear*, 31 N. J. L. 351; Washburn on Easements, 431.

Although these cases have given the rule laid down by them the name of the "common law rule," yet it is very uncertain whether it is any more in accord with the principles of the common law than the rule which recognizes the existence of the easement in favor of the upper owner. Indeed in *Gilham v. M. C. R. R.*, 49 Ill. 486, it was said that, "The doctrine of these cases (*Gannon v. Hargadon, supra, et al.*) wholly ignores the most valued and favored maxim of our law, *Sic utere tuo ut alienum non laedas*, a maxim lying at the very foundation of good morals, and so preservative of the peace of society." See also *Butler v. Peck*, 16 Ohio St. 363; *Bellows v. Sackett*, 15 Barb. 101, and *Boyd v. Conklin*, 54 Mich. 583, in which cases the rule of the common law is declared to be identical with that of the civil law and the use of the term, "common law rule," as above indicated, is declared to be unfounded. Curiously enough, the question does not seem to have been ever raised in England, but a writer in the American Law Review does not hesitate to express his opinion that the English courts will follow the rule of the civil law, preventing the lower owner from obstructing the flow of the surface water: 23 Am. Law Rev. 391. The same view is expressed in Wood on Nuisance, § 396, and 24 Am. & Eng. Enc. of Law, 917, n.

Perhaps the fairest and most reasonable view to take of the subject has been adopted by those courts which make a compromise between the civil law and common law rules. They say as regards lands in the country, where improvements and changes of level are comparatively infrequent, it is proper to allow the existence of the easement over the lower property; but as regards town and city lots, where changes and alterations are essential to their enjoyment, their owners may improve them as they see fit, and each man must look after his own surface drainage. In support of this view see *Bentz v. Armstrong*, 8 W. & S. (Pa.) 40; *Davidson v. Sanders*, 1 Pa. Super. Ct. 432; *Clark v. Wilmington*, 5 Har. (Del.) 243; *Waters v. Bay View*, 61 Wis. 642; *Cemetery v. Los Angeles*, 103 Cal. 467, and *Lampe v. San Francisco, supra*. This distinction commends itself to common sense and will probably be the one adopted by those states which are not yet bound by decisions in favor of either of the so-called civil or common law rules.



NEGLIGENCE ; JUDGMENT AGAINST ONE TORT-FEASOR NOT A BAR TO AN ACTION AGAINST THE OTHER. In the case of *Parmenter v. Barstow*, 47 Atl. 1035 (1899), the plaintiff claimed damages for personal injuries caused by the negligence of the defendant's servants in cutting stone on the sidewalk, a piece of which struck her in the eye. The defendants pleaded a former judgment against Chace, a joint tort-feasor with the defendants, in the plaintiff's favor for the same cause of action which was claimed in this suit. The plaintiff demurred to this plea on the ground that the judgment against Chace did not bar a recovery in this action.

The demurrer was sustained by the Rhode Island Supreme Court. The grounds upon which the court based its decision are best stated by Stiness, J. "The only two American cases which directly hold in favor of the bar of the former judgment are *Hunt v. Bates*, 7 R. I. 217 (1862) and *Wilkes v. Jackson*, 2 Hen. & M. (Va.), 355 (1808). The rule in this country is that joint tort-feasors may be sued separately. *Hunt v. Bates*, and, indeed, the English cases only hold the contrary in cases of trover and trespass. As to other torts there is a practical unanimity. Virginia stands alone in holding the judgment to be a bar in all cases. This it did in *Wilkes v. Jackson*, which was an assault case. That case has been recently reviewed and affirmed in *Petticolas v. City of Richmond*, 95 Va. 456, 28 S. E. 566 (1897), which was trespass on the case for negligence. The court rests wholly on the ground of the English cases and acquiescence for nearly a century in *Wilkes v. Jackson*. The court further based its decision on the general rule and, sustaining the demurrer, concluded its opinion with the statement that a judgment against one joint tort-feasor did not bar an action against another joint tort-feasor.

The English rule, as laid down in one of the best and latest cases on the subject, *Brensmead v. Harrison*, L. R. C. P. 547 (1872), is that a judgment in an action against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. See also *Adams v. Ham*, 5 U. C. Q. B. 292 (1849), and *Sloan v. Creasor*, 26 U. C. Q. B. 127 (1863).

This is also stated in the text books to be the English rule to-day ; see Webb's Pollack on Torts, p. 231 ; Baylies' Addison on Torts (6th Ed.), p. 94 ; Cooley on Torts, \* page 138 ; 2 Kent's Commentaries, 388, 389, and Underhill's Summary of the Law of Torts, p. 113, art. 35.

The American rule was first laid down by Chief Justice Kent. That rule, which, as stated by the eminent jurist is generally followed in the United States, is that the party injured may bring separate suits against the wrong-doers and proceed to judgment in each case ; and that no bar arises as to any of them until satisfaction is received.

This is admitted to be the general rule in the United States, as in the text books above cited and the cases to be cited, except in Virginia, as pointed out by Justice Stiness above.



*Golding v. Hall*, 9 Port. (Ala.) 169 (1839); *Blann v. Cocheron*, 20 Ala. 320 (1852); *Morgan v. Chester*, 4 Conn. 387 (1822), approved in *Ayer v. Ashmead*, 31 Conn. 447 (1863); *Union, Etc., Co. v. Sackett*, 19 Ills. App. 145 (1886); *Fleming v. MacDonald*, 50 Ind. 278 (1875); *Turner v. Hitchcock*, 20 Iowa, 310 (1866); *United Soc. v. Underwood*, 11 Bush. (Ky.) 265 (1875), 21 Am. Rep. 214; *White v. Phillbrick*, 5 Me. 147 (1827); *Aldrich v. Parnell*, 147 Mass. 409 (1888); *Kenyon v. Woodruff*, 33 Mich. 310 (1876); *Page v. Freeman*, 19 Mo. 421 (1854); *Lord v. Tiffany*, 98 N. Y. 412 (1885); *White v. Lathrop*, 2 O. St. 33 (1825); *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103 (1841); *Sanderson v. Caldwell*, 2 Aik. (Vt.) 195 (1826); *McGehee v. Shafer*, 15 Texas, 198 (1855); *Griffie v. McClung*, 5 W. Va. 131 (1872).

In Tennessee it is agreed that a judgment against one joint wrong-doer is not of itself a bar to suits against the others, but it is said that "the more reasonable doctrine on the other hand is, that as each of the wrong-doers is liable for his own act, separate actions may be brought at the same time or successfully, in each of which the plaintiff may proceed to judgment. But he claim or enforce only one satisfaction:" *Christian v. Hoover*, 6 Yerg. (Tenn.) 505 (1834).

The Federal Courts follow the general rule laid down by Chief Justice Kent. The first case on the point under discussion is *Lovejoy v. Murray*, 3 Wall. (U. S.) 1 (1865), wherein it is held that such a judgment (as the one spoken of in the case under discussion) against one joint tort-feasor is no bar to an action against the other. "Nothing short of full satisfaction," said Miller, J., "or that which the law must consider as such can make such judgment a bar." This case has been followed in *Sessions v. Johnson*, 95 U. S. 347 (1877), and *Birdsell v. Shaliol*, 112 U. S. 485, 489 (1884).

It is to be regretted that in *Parmenter v. Barstow*, nothing was said as to the satisfaction of the prior judgment against Chace. In England satisfaction was held to be not necessary in a judgment in trover, because title was held to have passed by the mere rendering of such judgment. This rule was extended, but wrongfully, as Kent shows, to all cases of tort.

We are of opinion, then, that the present case goes too far in holding that a judgment against one of two joint tort-feasors does not bar recovery in an action against the other. The court should have inserted in its opinion the saving proviso in *Lovejoy v. Murray*, namely, that such judgment is a bar only where full satisfaction has been recovered.

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FOREIGN CORPORATIONS; WHAT CONSTITUTES "DOING BUSINESS." An interesting question as to the meaning of the term "business" within statutes regulating foreign corporations is dis-

cussed in the case of *Delaware and H. Canal Co. v. Mahlenbrock* (N. J., 1899), 43 Atl. 978.

The plaintiff was a Pennsylvania corporation, in which state its mines were situate, and its principal offices were in New York. The coal for the price of which the suit was instituted was delivered to a resident of New Jersey. The defence was that the plaintiff company was a foreign corporation which had not complied with the New Jersey laws in its failure to file with the Secretary of State a copy of its certificate of incorporation, and was therefore disabled from suing in the state. The defence was based on a statute which provided that "until such corporation so transacting business in this state" shall have obtained from the Secretary of State a certificate authorizing it to do business, "it shall not maintain any action in this state upon any contract made in this state." The court, after deciding that the case did not fall within the statute, as the contract was made in New York, went on to discuss, *obiter dictum*, how the section would apply if the contract had been made in New Jersey. The conclusion reached is in accord with that enunciated by most courts where analogous cases have arisen; and declares, that the doing of a single act is not "transacting business" within the meaning of the act.

The provisions of statutes such as this are intended to affect foreign corporations entering the domestic state by their agents and engaging in the general prosecution of their ordinary business therein: *Knitting Co. v. Bronner* (Sup.), 45 N. Y. Suppl. 714 (1897); *Potter v. Bank of Ithaca*, 5 Hill, 80 (1843). To "transact business" means, according to the dictionaries, "to carry on, or to prosecute that which occupies the time, attention and labor of a man for the purpose of a livelihood or profit." The term must then comprise more than a single act unless there is an intent to continue in the doing of those acts coupled with the necessary preparation therefor: *Abel v. State*, 10 Ala. 631 (1890). But apart from the evidenced purpose to do more it may be stated as a rule that "isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens of another state, are not a doing or carrying on of business by the foreign corporation within the state:" 6 Thomp. Corp. Sec. 7936.

Where the statutes prohibits the doing of *any* business in the state, some courts follow the lead of Alabama and interpret them as applying to a single act of business, if it be in the exercise of a corporate function: *Farrior v. Security Co.*, 88 Ala. 275 (1889), and *Hacheny v. Leary*, 12 Oregon, 40 (1885). Though under a similar statute the contrary was held in *Gilchrist v. Helene, H. S. & S. Rwy. Co.*, 47 Fed. 593 (1891).

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WITNESSES TO A WILL; THEIR IGNORANCE OF THE NATURE OF THE DOCUMENT. The case of the *Missionary Society of the Methodist Episcopal Church v. Ely*, Ohio, Oct. 3, 1899 (not yet

reported), is an important and interesting case bearing upon the requirements of law as to witnesses to the signature of a testator. In this case Albert C. Ely died, leaving a will by which the Missionary Society was made one of the beneficiaries. In the Probate Court it was shown that the witnesses who acknowledged their signatures did not know they were witnessing a will. The probate judge, therefore, refused to admit it to probate, holding that the law requires witnesses to know that it is a signature to a will which they are witnessing. This decision was sustained by the lower court and by the Supreme Court of the State.

In the case of *White v. Trustees of British Museum*, 6 Bing. 310 (1829), the court said: "The testator need not sign his name in the presence of the witnesses, but a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of the signing." To the same effect are *Wright and Wright*, 7 Bing. 457 (1831); *Dewey v. Dewey*, 1 Met. 349 (1840). In *Hogan v. Grosvenor*, 10 Met. 56 (1845) the court said: "His acknowledgment that the instrument is his, with a request that they attest it, is sufficient."

In the case of *Brown v. McAllister*, 34 Ind. 375 (1870), there was no declaration by the testatrix, or any one else, as to whether there was any writing on the paper other than the signature of the testatrix, and no statement as to the object in requesting the witnesses to attest the signature. The court held that the statutory requirements had been complied with, and that the will should be admitted to probate.

In a Vermont case—*Roberts v. Welch*, 46 Vt. 164 (1873)—the rule laid down is, that subscribing witnesses to a will must subscribe as intending a testamentary execution; and hence they must know the character of the act they are to perform, and that the instrument was a will. In Missouri, under an enactment which is nearly a transcript of the Statute Charles II, it was held—*Odenvaelder v. Schorr*, 8 Mo. App. 458 (1880)—"that a subscribing witness must know the instrument to be a last will, and must subscribe at the testator's request."

The New York and New Jersey statutes expressly provide that the testator shall declare the paper to be his last will and testament.

## BOOK REVIEWS.

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STATE TRIALS OF MARY, QUEEN OF SCOTS, SIR WALTER RALEIGH AND CAPTAIN WILLIAM KIDD. Condensed and copied from the State Trials of Francis Hargrave and of T. B. Howell, with explanatory notes. By CHARLES EDWARD LLOYD. Chicago: Callaghan & Co. 1899.

If the editor had made this volume twenty times as large as it is, we should still call for more. To lawyer and layman alike every page is replete with interest. The records of the three trials are so presented as to give us three finished narratives, each one of thrilling vigor, and each, nevertheless, far different from the others.

There is a dramatic unity in the arrangement of the report of Queen Mary's case which makes it just as powerfully moving as many of the tragedies acted on the stage, and the royal victim's execution forms a more sublime catastrophe than some of those rated among the classics. Elizabeth's marvelously bold duplicity stands out in dark relief, and her blasphemous address to Parliament marks her as being for cunning and hardihood, not to mention other attributes, a second Clytemnestra. The imposing air of self-righteousness which she always maintains is shown in strange contrast with the chastened majesty of the Queen of Scots. Their characters, besides those of several who figured in the two other trials, are so sharply outlined, and the real state of facts in the three cases is so clearly manifested, as to lead us to believe that both biography and history would often be more interesting and better understood if they were supplemented by the legal reports extant concerning the personages or events under consideration. A casual remark, of little importance when uttered, sometimes gives us a vivid insight into the situation of men and affairs which whole chapters of modern historians cannot furnish.

But the work is to be valued chiefly for being an addition to the literature of the law. Lawyers will retain their professional dignity longer than those who follow the medical and other merely material sciences, if they will only keep in sight the close relation between their studies, comprising the rules governing man's social conduct, and all the studies which have to do with man as a social, intellectual, moral and æsthetic being. We must encourage, therefore, every effort to liberalize the lawyer's attitude towards his profession by presenting it to him in the various aspects which will appeal to his many-sided mind, which will attach to it a broad, human interest, and make it appear to him, not a collection of precedents or rules of thumb, but a rounded out integer, the living embodiment of the wisdom of ages, whose growth and progress, closely indented with

the growth and progress of humanity, have never halted in the past, and never can in the future. Hence, no light stress should be laid on the cultural quality of this and similar publications.

The artistic judgment apparent throughout deserves special attention. It was an admirable plan to place Raleigh's case after Queen Mary's, because in reading the former we are constantly reminded of that blind retribution which was the most terrible creation of the ancient dramatists. Raleigh had been the last of Elizabeth's favorites, and when James I, Mary's son, became King of England, it was not long before Raleigh was sent to the Tower on a trumped up charge of treason. Whether or not the King's resentment dated back to his mother's death is hard to tell, but Raleigh had frequent occasion to compare the injustice he suffered with that which had disgraced the former trial. Coke was the willing instrument in this second judicial murder. The language he used towards the luckless scapegoat was never surpassed by Jeffreys. "Go to, I will lay thee upon thy back for the confidentest traitor that ever came at a bar." "Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride." "There never lived a viler viper upon the face of the earth than thou." These are some of the flings in which Coke indulged. He distorted the law, and, when reproved for interrupting the prisoner, "sat down in a chafe," and had to be entreated to resume the case. Fifteen years later, after Raleigh had been released and had voyaged in command of a fleet to America, he was seized and brought before Coke, then Lord Chief Justice. Coke completed his infamy by sentencing him on the former judgment, and Raleigh's heroic death completed our second tragedy. The dialogue in this case is almost as racy and virile as any to be found in the works of contemporary playwrights.

Captain Kidd's trial introduces us aboard the pirate galley, "The Adventure," and shows us something of the manners and morals of the crew, their erratic journeys to and fro, their hours of sickness and idleness. Kidd's adventures and his acts of ferocious cruelty are related in such a matter of fact way that the effect is much enhanced. The simple account of the murder of Moore, the gunner, is particularly remarkable in this respect, and reveals Kidd's brutal nature as no amount of generalizing statements could. Kidd's servant, Richard Barlicorn, is an amusing fellow, and altogether this trial is as good as a romance.

Mr. Lloyd's editing has improved on the report in the Hargrave's and Howell's State Trials, but he might have further condensed it, and thus made room for the inclusion of a fourth case. There is so much delightful reading in the old State Trials that broad margins and repetitions and waste of space by means of other contrivances put one all out of patience. Let us hope that this book will be the first of a series. The wonder is that its publication was so long delayed. The State Trials are worth delving into, if only that we may become better satisfied with the law under which we now live. If the publishers were to get

out a volume containing the cases in which various members of the house of Howard were unjustly condemned, that volume alone would open the eyes of many who hold in awe the memory of Coke and of the jurists who flourished immediately before and after him. We would welcome also a volume containing the records of the persecutions of the Jesuits, of the plots to entrap their superior, Garnet, of the official connivance with Oates and Dangerfield, of the trial of the Jesuit poet, Southwell, who was racked thirteen times, of Father Campian and his twelve companions, and of the six who were unjustly condemned with the equally innocent Viscount Stafford. After studying these cases and the cases of Lord Strafford and Thomas Lee, and of others who were executed either after farcical judicial proceedings or without a trial at all, one feels that we cannot appreciate our own happy lot without realizing how much better off we are than our ancestors. Those centuries of oppression left their traces even upon the records of American courts, and Messrs. Callaghan & Company have a rich field open to them in this direction.

J. J. S.

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THE GROWTH OF THE CONSTITUTION. By WILLIAM M. MEIGS.  
Philadelphia: J. B. Lippincott Co. 1900.

A recent book of interest, not only to students of constitutional and American history, but to lawyers as well, is Mr. William M. Meigs' "Growth of the Constitution." This is not Mr. Meigs' first venture into the field of American historical writing, as he has already given us a "Life of Charles Jared Ingersoll."

The *raison d'être* of his book on the Constitution the author gives in his preface as follows: "I have on more than one occasion wanted to know accurately the history and development of some particular clause of the United States Constitution in the Convention of 1787, but have always found it very difficult to succeed in tracing the matter out to my satisfaction. It is a very wearying process to follow a particular portion of the instrument through the whole convention; and, indeed, no matter how carefully this is done, one is sure to miss a good many ideas which were thrown out at times when entirely different portions of the instrument were under consideration. Thinking over the matter at that time led me to wonder whether it would not be possible and worth while to go through all the proceedings of the convention and write a history of each separate clause. The following book is an outgrowth of that idea."

That Mr. Meigs has succeeded admirably within the limits he mapped out for himself, no one who has examined the book can doubt. He has performed a work which will enormously diminish the labors of students of the Constitution and which places before them in clear and succinct form the result of what must have been very laborious research.



It is true that the materials from which the Constitution was framed are so familiar and, generally speaking, so complete that we find little that is new in the book. But Mr. Meigs has thrown an interesting side light on the proceedings in the convention, by reproducing in fac-simile the so-called Randolph draft of the Constitution and which he considers to be the one (or one of two) used in the Committee of Detail of which Randolph was a member. As indicating the development or modification of ideas brought forward in the convention and as showing how they were reflected in the committee, this document is very interesting and helps in rounding out our knowledge of transactions which have since so greatly affected our national welfare.

Altogether Mr. Meigs is to be congratulated on his excellent performance of a laborious task and his publishers are to be thanked for issuing a book the type of which is easy and pleasant to read.

*E. B. S., Jr.*

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**NERVOUS AND MENTAL DISEASES.** By ARCHIBALD CHURCH, M.D., of the Northwestern University Medical School, and FREDERICK PETERSON, M.D., of the Woman's Medical College, New York. Philadelphia: W. B. Saunders. 1899.

In common with all the books published by this firm, this volume is an excellent presentation of the subject in question. The numerous illustrations scattered throughout the text add materially to the interest, and the subject-matter is ably and thoroughly discussed. While having no direct bearing upon law, there is much both of interest and value to the legal expert contained within the book, especially with reference to insanity and mental and moral depravity.

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**A REVIEW OF RECENT LEGAL DECISIONS AFFECTING PHYSICIANS, DENTISTS, DRUGGISTS AND THE PUBLIC HEALTH.** By W. A. PARRINGTON. New York: E. B. Treat & Co. 1899.

The author of this little volume has condensed into a limited space much of intrinsic value to both medical and legal men. The relations of medicine to law have, unfortunately, been but imperfectly understood, and any contribution that will more clearly define the mutual bearings of the two professions must be a welcome addition to medico-legal science. This result can best be arrived at by reference to the recent decisions in important cases, and in the present volume we find a *résumé* of some of the latest medical legislation. The subjects dealt with include the need of examining boards and their qualifications; the relations of medicine to dentistry, Christian Science and osteopathy; fees, and the legitimate value of medical services rendered; the scope of the term "malpractice;" the value of X-ray photographs as evidence in surgical cases; the unauthorized use of physicians' names in the advertising of proprietary medicines, and many other equally as interesting and



important medico-legal subjects. Of special interest is the decision rendered in regard to a defendant who was charged, in Illinois, with practicing osteopathy. As he professed ability to understand and treat human ailments intelligently and successfully, it was held that he practiced medicine within the definition of the Illinois statute. In Ohio, on the contrary, it was held that an osteopath is not a practitioner of medicine within the statute. It would seem imperative that an interstate or national legislation should be provided, clearly defining a legal medical practitioner in such unmistakable terms as to exclude all quacks and quasi-doctors who could not present on request a diploma from some recognized medical college. Professor Parrington's book is well worthy of careful perusal, and should find a place in the library of all medical and legal men.

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QUESTIONS AND ANSWERS FOR BAR EXAMINATION REVIEW. By CHARLES S. HAIGHT and ARTHUR M. MARSH. New York: Baker, Voorhis & Co. 1899.

This book is prepared along the line of the present theory of examination for admission to the bar. A student is no longer asked to define a partnership or a corporation, but is required to state the rights or the liabilities of the parties in a given case. The examiner wishes to know if the student can apply legal principles. The authors in the preparation of their book have constantly kept that end in view, and the book, no doubt, will be of great value to students who have covered the work and wish an aid for review just before an examination.

The book, from a mechanical standpoint, is good, as it is printed in a clear, plain type. It contains an excellent Table of Contents and a well-prepared Table of Cases from most of the States of the Union, and many English cases.

Citations have been chosen from all jurisdictions, and where there is a conflict between the different states upon any material point the conflict is noted and the conflicting decisions given, as far as possible.

At the close of the book there is a well and fully prepared Index, so that a student may turn to any subject with very little difficulty. As the authors say, "the cases cited should be read as far as such a course is feasible." If this is done by any student he cannot help getting a clear understanding of the subject.

*J. E. S.*

## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE.**

Edited by JOHN CUTLER. London: Butterworth & Co. 1898.

**A TRUSTEE'S HANDBOOK.** By AUGUST P. LORING. Boston: Little, Brown & Co. 1898.

**THE LAW OF DEBTOR AND CREDITOR.** By RUFUS WAPLES. Chicago: T. H. Flood & Co. 1898.

**EXPERIENCE IN THE UNITED STATES SUPREME COURT.** By A. H. GARLAND. Washington, D. C.: John Byrne & Co. 1898.

**THE ELEMENTS OF MERCANTILE LAW.** By T. M. STEVENS. London: Butterworth & Co. 1898.

**HISTORY OF THE LAW OF REAL PROPERTY.** By KENELM EDWARD DIGBY. Fifth Edition. Oxford Press, London and New York: Henry Frowde. 1897.

**THE FEDERAL COURTS.** By CHARLES H. SIMONTON. Richmond, Va.: B. F. Johnson Publishing Co. 1898.

**THE ANNOTATED CORPORATION LAWS OF ALL THE STATES.** By ROBERT C. CUMMING, FRANK B. GILBERT and HENRY L. WOODWARD. Three Volumes. Albany: J. B. Lyon Company. 1899.

**GENERAL DIGEST, AMERICAN AND ENGLISH.** Vol. VI. New Series. Rochester, N. Y.: Lawyers' Co-operative Publishing Co. 1899.

**AMERICAN PRACTICE REPORTS.** Vol. I. Edited by CHARLES A. RAY, LL.D. Washington: Washington Law Book Co. 1899.

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AN INTERESTING CONSTITUTIONAL QUESTION.

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HOW UNAUTHORIZED GUBERNATORIAL APPOINTMENTS TO  
THE UNITED STATES SENATE MAY BE ATTACKED.

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To the lawyer there is, perhaps, a no more interesting document than the Constitution of the United States. Framed by master minds who knew the wisdom of declaring the rights and privileges of the central government without defining them, and construed by the most astute legal intellects, it stands as a monument to the learning and understanding of the American people. It expands with the nation and is ever ready to include within its grasp new conditions which may arise so that, with few changes in its verbiage, it has already grown a hundred fold since its execution. Applied from time to time to existing facts, there are now few cases in which its construction is not required because of some new condition or conditions. There are still, however, some questions which might have been presented in the 18th Century but which have been left undiscussed until the present day, and among them is the subject of our paper.

The Supreme Court of the United States construes the Constitution, and until its decision has been rendered upon any clause, that clause remains, strictly speaking, undefined. The Supreme Court speaks and, as to the application of the Constitution to the facts before it, its words are final. But where it has not spoken it is proper to discuss what its construction might be of one of those undefined clauses such as that which we are now to treat, viz.: "Each house shall be the judge of the *elections, returns and qualifications* of its own members." Part of Article I, Section 5.

It is conceded that under this clause, each house is the sole judge of "the elections, returns and qualifications of its own members," but the lay mind will immediately inquire what bearing this clause has upon gubernatorial appointments which are neither elections, returns nor qualifications. This inquiry brings us directly to the burden of our subject.

Section 3 of Article I declares, *inter alia*, that, "The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

"Immediately after they shall be assembled, in consequence of the first *election*, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that only three may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any state, the executive thereof may make temporary *appointments* until the next meeting of the legislature, which shall then fill such vacancies.

"No person shall be a senator who shall not have attained to the age of thirty and been nine years a citizen of the United States, and who shall not when elected be an inhabitant of that state of which he shall be chosen."

Section 4. "The times, places and manner of *holding elections* for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at

any time by law make or alter such regulations except as to the place of choosing senators."

It is perfectly clear that the Constitution does not in express terms provide that either house shall be the judge of the *appointments* of its own members. Such a provision would, of course, only apply to the Senate, there being no power of appointment to the House of Representatives. The question, therefore, is whether or no the power to pass upon appointments is implied in the Senate. This implication might arise in one of two ways: 1. From the terms of the Constitution itself applying thereto the ordinary rules of construction; or 2. From the inherent nature of the body exercising the power.

Before considering these two possible implications it may be well to notice in passing the words used: "Elections, returns and qualifications." The word "election" is practically defined in an earlier clause above quoted which declares that a senator shall be chosen by the legislature and what the Senate shall do immediately after such election. In its broadest significance, the word cannot mean appointment, the same section declaring that in one event the executive of a state may make temporary appointments. In short, an election is a choice by the legislature representing the people, and an appointment is merely a nomination by the executive as a matter of convenience. The word "returns" used in connection with elections refers to the formalities accompanying and succeeding the actual election. *Qualifications* refers to personal requirements. To quote from the *Federalist*, No. 62, "The *qualifications* proposed for senators as distinguished from those of representatives consist in a more advanced age and a longer period of citizenship. A senator must be thirty years of age, at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter."

Having thus referred briefly to the three words used without attempting a minute examination of each, this paper being intended to be rather suggestive than argumentative, we will proceed to see how far the word "appointments" may be impliedly inserted in the Constitution. And first we must

observe the terms of the Constitution itself. In doing this let us remember that "it is established as a general rule that when a constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one:" Cooley's Constitutional Limitations, 78. And the implication can only be of the particular powers necessary for the exercise of the general power. Where, therefore, the Senate is given the power to judge of the elections, returns and qualifications of its own members, only those additional powers can be implied *which are necessary* to arrive at a satisfactory judgment in regard to such elections, returns and qualifications.

On the other hand, as gubernatorial appointments are merely substitutionary, only allowed to be made when an election is not practical owing to the state legislature not being in session at the time the vacancy in representation to the Senate occurs, it might be argued that the word "elections" should be held to include not only elections proper but their substitutes as well.

The objection to this argument is that it is conjectural and open to the criticism that might very well be made and which is justified by an examination of the instrument, that the framers of the Constitution did not construct phrases in that loose manner. The argument depends for its strength upon the intention of those gentlemen, and while it is conceded that intention is a very necessary element in construing doubtful or inconsistent clauses only of any instrument, it may also be urged, if intention is brought into the discussion, that the word "appointment" was intentionally omitted in order to avoid just what is now threatened in the State of Pennsylvania.

During the last session of the legislature of that state, the term of United States Senator M. S. Quay expired, and several attempts were made to elect a successor. Owing to what is commonly known as a "deadlock" the legislature failed in its attempt. Mr. Quay was one of the nominees considered by the legislature. Shortly after the adjournment



of the legislature the governor of the state appointed Mr. Quay to succeed himself. Owing to the impression that there is no remedy in courts of law, there have been many conjectures regarding the action which the United States Senate will take in the matter, the interest in which has been heightened by the fact that Mr. Quay is not the choice of the legislature of Pennsylvania.

Representation is the rock upon which our free institutions are founded. It is the mother of those institutions, gave them birth and nourished them to become the common heritage of all. This principle of government is encased in the Constitution which we regard with reverence and admiration as we regard a masterpiece of art. It is not, therefore, unreasonable to believe that, while the Constitution gave the executive of any state the power to make an individual and, perhaps, personal appointment to the United States Senate, its authors intended to protect the citizens against the abuse of that power by leaving in their hands every available instrument of restraint, and accomplished their purpose by refraining from making the Senate the judge of the appointment of its members.

Were this an argument before a court of law there might be many other points suggested in this connection, but as we are merely reviewing briefly and in a general way a constitutional question, and as there are other phases of it, we may now proceed to a brief consideration of the latter.

Having observed the terms of the instrument itself, let us secondly regard the question before us in the light of the inherent nature of the Senate. There are certain powers inherent in the highest legislative bodies. When the people, the sovereignty, come together to organize a government they "parcel out the three great powers thereof, the legislative, the executive and the judicial, among the three co-ordinate and principal depositaries to which they are committed. Though the Constitution confers upon specified courts general judicial power, there are certain powers of a judicial nature which by the express terms of the same instrument are given to the legislative body and among them" the power to judge of the elections, returns and qualifications of its members. "In such

case it may well be that a form of words in the instrument that clearly makes a gift of judicial power to one co-ordinate body should be construed as reserving the particular power thus bestowed from the general conferment of judicial power by the same instrument, at the same time, upon another co-ordinate body. The power thus given to the houses of the legislature is a judicial power, and each house acts in a judicial capacity when it exerts it. The express vesting of the judicial power, in a particular case, so closely and vitally affecting the body to whom that power is given, takes it out of the general judicial power."

It may further be stated to be a general rule of law that a supreme legislative body has, by implication, extra express grant, power to judge of the elections, returns and qualifications of its members. But where that power is expressly given there is, of course, no implication. It might also be suggested here that where the power to judge of an election is given, and there is provision for an appointment, the power to judge of which is not expressly given, the latter is not lodged exclusively in the body to whom the appointment is made. The United States Senate has, of course, the power by implication to pass upon the appointment of its members until the appointment is questioned by a court of competent jurisdiction, but that power is not, like the others, made exclusive by being given in express terms. On the contrary, the opposite conclusion might be urged with considerable force, namely: That by its omission from the express grants there is a strong implication that the Senate's jurisdiction is not to be exclusive in regard to it.

As already intimated above, this construction might be urged as appearing to make a very proper disposition of the question. Although the power to pass upon elections, etc., has been defined as judicial, it is in reality rather one of the powers incident to a jury—to pass upon facts. The judicial function is merely incidental. Election controversies consist very largely of matters of fact, such as whether one man or another has received a greater number of votes. Returns are mere matters of form, while qualifications are entirely matters

of fact. When, therefore, there may be a controversy which shall involve nothing but principles of law, it is reasonable that jurisdiction over such should not be taken from the courts of justice. A contested appointment is a controversy of that kind. One governor is not likely to appoint two men to the same position, and it is difficult to conceive of any other reason existing for attacking an appointment than that the governor was not authorized by law to make it. If this was the reasoning of our forefathers, experience has demonstrated their sagacity. There have been several gubernatorial appointments to the United States Senate, and in all cases where the appointment proper has been attacked the attack, so far as the writer is aware, has been based entirely upon constitutional incapacity in the governor making the appointment. Heretofore, the decisions of the Senate have been uniform upon the question now presented again by Mr. Quay's application for a seat. The seat has been refused on the ground that the governor can only make an appointment when, in the terms of the Constitution, "vacancies happen by resignation or otherwise during the recess of the legislature of any state." There has, therefore, been no opportunity for the possible application of the remedy about to be suggested. It is probably for this reason that the question under discussion has not already been authoritatively determined. And again there may be no opportunity for raising it if the United States Senate abides by the terms of the Constitution.

Section 2, Article III. of the Constitution provides that, "the judicial power shall extend to all cases in law and equity arising under this Constitution . . . ." Mr. Cooley in his work entitled *Constitutional Limitations* says that, "so far as the instrument apportions powers to the national judiciary it must be understood for the most part as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the Federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not of its own force give to national courts jurisdiction of the several cases which it enumerates, but an Act of Congress is essential, first : to create courts and

afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name, and although the courts of the United States administer the common law in many cases, they can recognize as offences against the nation only those acts which are made criminal and their punishment provided for by Acts of Congress."

The Act of Congress of 27th February, 1801, provides in Section 1, that the laws of the State of Maryland, as they then existed shall be and continue in force in that part of the District of Columbia, which was ceded by that state to the United States. This is an important provision when it is recalled that the common law of England was in force in Maryland at that time. The third section of the act provides that, "there shall be a court in this district which shall be called the Circuit Court of the District of Columbia; the said court and the judges thereof shall have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States."

By the fifth section the court has cognizance of all actions or suits of a civil nature at common law or in equity in which the United States shall be plaintiffs or complainants; and also of all cases in law and equity between parties, both or either of whom shall be resident or found within the district.

Under the terms of the Constitution and this act it is suggested that information in the nature of *quo warranto* proceedings might be instituted in the Supreme Court of the District of Columbia by the United States, through its proper officer, against one occupying a seat in the United States Senate by virtue of an unconstitutional appointment. The United States Government represents the people who, in this country, are the sovereign power. The late lamented James L. High in "Extraordinary Legal Remedies," says, "since under the American system all power emanates from the people who constitute the sovereignty the right to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise is *regarded as inherent in the people* in the right of their sovereignty. And the title to

office being derived from the will of the people, they are necessarily vested with a right of enforcing their express will by excluding usurpers from public offices. Nor is this right in any manner impaired by statutes granting to electors in their private capacity as citizens the right to contest the election of any person assuming to exercise the functions of an office. Such statutes may have the effect of sharing the right with the elector but they do not take away the *right from the people in their sovereign capacity.*"

Information in the nature of *quo warranto* is a common law remedy. In this connection it might be well to cite a passage from the opinion of Mr. Chief Justice Tillman in an old Pennsylvania case (*Commonwealth v. Murray*, 11 S. & R. 74), decided in 1824: "The Statute of 9 Anne not having been extended to this commonwealth all our proceedings in the nature of *quo warranto* are at common law. The ancient writ of *quo warranto* having been found inconvenient has long been discontinued and the information in nature of *quo warranto* adopted in lieu of it. But informations are not granted except in cases where the writ itself would have lain. We must inquire, therefore, what those cases are. The object of the writ of *quo warranto* seems to have been to remove some usurpation of the rights or prerogatives of the crown. It is defined by Blackstone (3 Com. 262) to be "in nature of a writ of right for the king against him who claims or usurps any office, franchise or liberty to inquire by what authority he supports his claim in order to determine the right."

Before the people, the sovereignty, can interfere, two things are requisite: First, it must appear that they have not transferred their right to any person or body of persons, and second, the court to which their petition is presented must be shown to have jurisdiction. The first of these has already been discussed and the second is now under consideration. There appears to be strong ground for the contention that, in view of the nature of the proceedings, jurisdiction of the question before us has been lodged in the Supreme Court of the District of Columbia by the language of the Constitution and the Acts of Congress. We have seen that the suit sug-

gested, information in the nature of *quo warranto*, is one to be brought by the sovereign, the United States, and that the remedy is a common law remedy.

Bearing in mind, then, that the Supreme Court of the District of Columbia (it having succeeded the Circuit Court of that district) exercises, through the adoption of the law of Maryland, a common law jurisdiction, and that information in the nature of *quo warranto* was a common law proceeding just as mandamus was a common law proceeding, the remarks of Mr. Justice Thompson in *Kendall v. United States, ex. rel.*, 12 Peters, 524, will throw light upon the subject :

“ But let us examine the Act of Congress of the 27th of February, 1801, concerning the District of Columbia, and by which the Circuit Court is organized and its powers and jurisdiction pointed out. And it is proper, preliminarily, to remark that, under the Constitution of the United States and the cessions made by the states of Virginia and Maryland, the exercise of exclusive legislation in all cases whatsoever is given to Congress. And it is a sound principle, that in every well-organized government the judicial power should be co-extensive with the legislative, so far, at least, as private rights are to be enforced by judicial proceedings. There is in this district no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government, and it is reasonable to suppose that, in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The Circuit Court here is the highest court of original jurisdiction, and if the power to issue a mandamus in a case like the present exists in any court it is vested in that court.

“ Keeping this consideration in view, let us look at the Act of Congress.

“ The first section declares that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the district which was ceded by that state to the United States, which is the part lying on this side the Potomac, where the court was sitting when the mandamus was issued.

It was admitted on the argument that, at the date of this act, the common law of England was in force in Maryland, and, of course, it remained and continued in force in this part of the district; and that the power to issue a mandamus in a proper case is a branch of the common law cannot be doubted, and has been fully recognized as in practical operation in that state in the case of *Runkel v. Winemiller and others*, 4 Harris & M'Henry, 448. That case came before the court on a motion to show cause why a writ of mandamus should not issue, commanding the defendants to restore the Rev. William Runkel into the place and functions of minister of a certain congregation. The court entertained the motion, and afterwards issued a peremptory mandamus. And in the opinion delivered by the court on the motion, reference is made to the English doctrine on the subject of mandamus; and the court say that it is a prerogative writ, and grantable when the public justice of the state is concerned, and commands the execution of an act where otherwise justice would be obstructed: 3 Bac. Ab. 527. It is denominated a prerogative writ, because the king being the fountain of justice, it is interposed by his authority transferred to the court of king's bench, to prevent disorder from a failure of justice where the law has established no specific remedy, and where, in justice and good government, there ought to be one: 3 Burr, 1267. It is a writ of right, and lies where there is a right to execute an office, perform a service or exercise a franchise, and a person is kept out of possession and dispossessed of such right and has no other specific legal remedy: 3 Burr, 1266.

"These and other cases where a mandamus has been considered in England as a fit and appropriate remedy are referred to by the general court, and it is then added that the position that this court is invested with similar powers is generally admitted, and the decisions have invariably conformed to it, from whence, say the court, the inference is plainly deducible that *this court may, and of right ought, for the sake of justice, to interpose in a summary way to supply a remedy, where, for the want of a specific one, there would otherwise be a failure of justice.*



"The theory of the British Government and of the common law is, that the writ of mandamus is a prerogative writ, and is sometimes called one of the flowers of the crown, and is, therefore, confided only to the king's bench, where the king, at one period of the judicial history of that country, is said to have sat in person, and is presumed still to sit. And the power to issue this writ is given to the king's bench only, as having the general supervising power over all inferior jurisdictions and officers, and is coextensive with judicial sovereignty. And the same theory prevails in our state governments where the common law is adopted, and governs in the administration of justice; and the power of issuing this writ is generally confided to the highest court of original jurisdiction. But it cannot be denied that this common law principle may be modified by the legislature in any manner that may be deemed proper and expedient. No doubt the British Parliament might authorize the Court of Common Pleas to issue this writ, or that the legislature of the states where this doctrine prevails might give the power to issue the writ to any judicial tribunal in the state according to its pleasure, and in some of the states this power is vested in other judicial tribunals than the highest court of original jurisdiction. This is done in the State of Maryland, subsequent, however, to the 27th of February, 1801. There can be no doubt but that, in the State of Maryland, a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by law, and if it would lie in that state there can be no good reason why it should not lie in this district in analogous cases. But the writ of mandamus, as it is used in the courts of the United States, other than the Circuit Court of this district, cannot, in any just sense, be said to be a prerogative writ according to the principles of the common law.

*"The common law has not been adopted by the United States as a system in the states generally as has been done with respect to this district."*

"Thus far the power of the Circuit Court to issue the writ of mandamus has been considered as derived under the first

section of the Act of 27th of February, 1801. But the third and fifth sections are to be taken into consideration in deciding this question. The third section, so far as it relates to the present inquiry, declares: 'That there shall be a court in this district, which shall be called the Circuit Court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States.' And the fifth section declares: 'That the said court shall have cognizance *of all cases, in law and equity*, between parties, both or either of which shall be resident or be found within the district.'

"By the fifth section, the court has cognizance of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and also of all cases in law and equity between parties, both or either of whom shall be resident or be found within the district. This latter limitation can only affect the exercise of the jurisdiction, and cannot limit the subject-matter thereof. No court can, in the ordinary administration of justice, in common-law proceedings, exercise jurisdiction over a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction of the court. And besides, this is a personal privilege which may be waived by appearance; and if advantage is to be taken of it, it must be by plea or some other mode at an early stage in the cause. No such objection appears to have been made to the jurisdiction of the court in the present case. There was no want of jurisdiction, then, as to the person; and as to the subject-matter of jurisdiction, it extends, according to the language of the Act of Congress, to all cases in law and equity. This, of course, means cases of judicial cognizance. That proceedings on an application to a court of justice for a mandamus, are judicial proceedings, cannot admit of a doubt, and that this is a case in law is equally clear. It is the prosecution of a suit to enforce a right secured by a special Act of Congress, requiring of the Postmaster-General the performance of a precise, definite and specific act plainly enjoined by the

law. It cannot be denied but that Congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the Circuit Court of this district, it exists nowhere. But, by the express terms of this act, the jurisdiction of this Circuit Court extends to all cases in law, etc. *No more general language could have been used.* An attempt at specification would have weakened the force and extent of the general words, 'all cases.' Here, then, is the delegation, to the Circuit Court, *of the whole judicial power in this district*, and in the very language of the Constitution, which declares that the judicial power shall extend to all cases in law and equity arising under the laws of the United States, etc., and supplies what was said by this court in the cases of *McIntire v. Wood*, 7 Cranch, 504, and in *M'Clung v. Silliman*, 6 Wheat. 598, to be wanting, namely: That the whole judicial power had not been delegated to the Circuit Courts in the states, and which is expressed in the strong language of the court, that the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government."

Referring to the change of the Circuit Court into the Supreme Court of the District of Columbia, to which attention has already been called, it may be well to add that the jurisdiction of the latter is the same as that of the former, as far as our subject is concerned.

In *United States v. Schurz*, 102 U. S. 378, Mr. Justice Miller says: "We are met at the threshold of this inquiry by a denial of the authority of the Supreme Court of the District of Columbia to issue a writ of mandamus as an original process.

"The argument is, that the jurisdiction of that court over this class of subjects is governed by section 760 of the Revised Statutes relating to the District of Columbia. That section enacts that 'the Supreme Court shall possess the same power and exercise the same jurisdiction as the Circuit Courts

of the United States.' As this court decided in *McIntire v. Wood*, 7 Cranch, 504, and *McClung v. Silliman*, 6 Wheat. 598, that the Circuit Courts of the United States possessed no such power, the argument would be perfect if no other powers on that subject existed in the Supreme Court of the district than what is conferred by the above section.

" This court, in *Kendall v. United States*, 12 Pet. 524, had under consideration the Act of February 27, 1801, organizing originally the courts of this district. It was held that the clause of the act declaring the laws of Maryland to be in force at that date in the part of the district ceded by her invested the Circuit Court, as it was then called, with this very power, *because it was a common-law jurisdiction*, and the common law on that subject was then in force in Maryland. This proposition has been repeatedly upheld by the court since that time, and up to the date of the revision it was no longer an open question that in a proper case the court had authority to issue the writ.

" It is now said, however, that this section being enacted as of the first day of December, 1873, defines the jurisdiction of the Supreme Court of the district as governed by the powers of the Circuit Courts of the United States over the same subject at that date, at which time it is clear these latter courts had no such power; and that, as the revision repealed all other laws on the same subject, the act concerning the law of Maryland no longer applied to the case.

" This leaves out of the process of reasoning the ninety-second section of the revision, which declares again that 'the laws of the State of Maryland, not inconsistent with this title, as the same existed on the twenty-seventh day of July, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the district.' Thus the argument is precisely the same as it was in *Kendall v. United States*, for it was urged there, as here, that as the act creating the court measured its jurisdiction by that of the Circuit Courts of the United States, which had no jurisdiction, there could be none in the former; to which the court replied, the provision which continued in force the laws of Maryland.

“ The revision has merely separated the different sections of the Act of February 27, 1801, and placed part of it in section 760 and part of it in section 92. Neither provision is repealed, and we think that both of them are retained, with the construction placed on them by this court in *Kendall v. United States* and the subsequent cases. But this question would seem to be set at rest by the Act of 1877, ‘ to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia.’ The act amends section 763 of the Revised Statutes relating to the District of Columbia, by enacting that ‘ said courts shall have cognizance of all crimes and offences committed within said district, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants :’ 19 Stat. 253.

“ We are of opinion that the authority to issue writs of mandamus *in cases in which the parties are by the common law entitled to them* is vested in the Supreme Court of the District of Columbia.”

Where there is a right there should be a remedy for its infringement and a satisfactory one. If it be true that the exclusive power to pass upon appointments to its body was withheld from the Senate because that power should not be taken from the people, it follows that the people are entitled to a remedy in the case before us and the Acts of Congress will be construed in a manner to afford that remedy if such construction is in harmony with the language of those acts.

In conclusion, it might be added that there have been some suggestions in current literature that the one remedy for unauthorized gubernatorial appointments, if confirmed by the Senate, lies in an amendment of the Constitution. It is this suggestion that has influenced the writer to offer a counter one. The question is an interesting one in itself, aside from the fact that it may never arise in a court of law, owing to the respect which the people at large, through their representatives assembled in Congress, have for the Constitution.

*Reginald H. Innes.*

## FEDERAL TAXATION OF INHERITANCE.

A state cannot tax a patent right. The reason is that such taxation would be an interference with federal purposes. New York tax assessors tried to do this very thing a year or two ago. In assessing the capital stock of the Edison Electric Illuminating Company of Brooklyn, they included \$945,000, the value of certain patent rights owned by the company. The assessment was vacated by the court: *People ex rel. Edison El. Il. Co. v. Assessors*, 156 N. Y. 417. Similar effort had been made in Pennsylvania a few years earlier, when the commonwealth sought to collect a tax on the patents of the Westinghouse Electric and Manufacturing Company, and of the Westinghouse Air Brake Company. Judge McPherson considered the matter with the ability characteristic of that judge, and showed that the capital invested in patent rights is not taxable. The Supreme Court affirmed his decision: 151 Pa. 265, 276. The next year, in 1893, they repeated their ruling: *Commonwealth v. Philadelphia Company*, 157 Pa. 527; *Commonwealth v. Edison Electric Light Co.*, 157 Pa. 529. Cases could be cited from other states, were it necessary.

Copyright has been recognized as on the same footing as patent rights: *People v. Roberts*, 159 N. Y. 70.

It is different where the taxation is of the machinery or apparatus, or on the articles produced. "The use of the tangible property which comes into existence by the application of the discovery is not beyond control of state legislation, simply because the patentee acquires a monopoly in his discovery:" *Patterson v. Kentucky*, 98 U. S. 501, 506. An illustration of this occurred in Pennsylvania about nine years ago. The commonwealth taxed a leasehold interest in the manufactured instruments of the Bell Telephone Company, in Harrisburg. Mr. Justice Williams delivered a forcible and convincing opinion sustaining the tax: *Commonwealth v. Central District and Printing Telegraph Co.*, 145 Pa. 121. A like tax against the Brush Electric Light Company was sustained at the same time. Page 147.

A Nebraska tax on the property of the Union Pacific Railroad Company was likewise upheld in the United States Supreme Court. Mr. Justice Strong said: "The tax is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government:" *Railroad Co. v. Peniston*, 18 Wallace, 5.

Let us now suppose the case of a state taxation of articles of a certain class at a rate specified, with the proviso that in case any of the articles should be covered by a patent, then the tax rate should be at an increased rate named. Such a separation of articles from others of the same kind, and taxing them, "for revenue only," at a higher rate simply because they were covered by patents, would be an act of jealousy and enmity. It would surely be regarded by the federal courts as an interference with that encouragement which is the purpose of the patent laws. The situation may be better appreciated, possibly, through an illustration. A customer goes, we will suppose, into a hardware store and asks for a lawnmower. The salesman produces several, and says, now this one of A's make is \$3, while this one of B's is \$6. The customer notices that while B's is much preferable to A's, the expense incident to its manufacture is about the same, and inquires what is the reason for the great difference in the prices. Why, says the salesman, B's lawnmower is protected by patent, and the state has passed a law that all lawnmowers covered by a United States patent shall pay each a tax of \$3. Well, that is unfortunate, says the customer. I would much prefer the B article, but fear I must content myself with the A machine; but I see other lawnmowers, better and larger than these I have looked at. What are their prices? Well, the



salesman says, here is one of C's ; ordinarily, it would be \$6, but the state enacted, in the law I just spoke of, that all lawnmowers covered by a patent should pay a tax of \$4 if of the value of \$6, so we have to make these \$10. Well, well, says the customer, that is very strange, but what is this other mower sold for? \$15, says the salesman. You see, we would sell it for \$10, but the state has enacted that all lawnmowers covered by patent shall pay a state tax of \$5, if of the value of \$10. But here's one almost as good which you can have for \$11, because there is no patent on it, and therefore it has no tax to pay.

Let us suppose that the Nebraska tax, instead of being a general one on all railroad companies, had been a special and more burdensome taxation of those railroad companies which derived their charter from Congress. This would certainly have been regarded by the United States as interference. Mr. Justice Strong, in the case sustaining the Nebraska act, alluded to the fact that the property of the Union Pacific was taxed in common with all other property in the state of a similar character.

The cases already mentioned are rather recent, but the principles which they illustrate were recognized long ago. *McCullough v. Maryland*, 4 Wheaton, 316, is familiar to all, but we will look at it for a moment. The State of Maryland, it will be remembered, had imposed a tax on the circulation of the United States Bank. The Supreme Court held that as the bank, in its issue of notes, was to be regarded as an agency of the United States, its operations could not be restricted by the state. Chief Justice Marshall said: "If the states may tax an instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government."

A state tax interfering with interstate or foreign commerce, or with the rights of citizens of sister states, would be void:

*Ward v. Maryland*, 12 Wallace, 418. A tax collector endeavored to collect a state tax on salaries from the commander of a revenue cutter on Lake Erie. The attempt failed, of course: *Dobbins v. Erie County*, 16 Peters, 435.

There are many subjects of concurrent taxation by nation and state. "It was laid down in the *Federalist* and has never been controverted, that the rights of the United States to tax does not preclude a state from taxing a subject-matter which has been already taxed by Congress, subject to the priority of the United States if the fund is insufficient to meet both demands:" Hare, American Constitutional Law, p. 330. A liquor license, issued by the United States, leaves the state at full liberty to insist on a state license as well. The United States, when its license is issued, has no concern whether the liquor business flourishes or languishes. It merely seeks to raise revenue. Where, however, the privilege or license is in a matter wherein federal interests are at stake the case is otherwise. A coasting license cannot be interfered with by the state: Hare, American Constitutional Law, 330.

The decisions denying the power of the state to tax federal agencies are upon the principle that sovereign rights are not subject to the molestation of other powers. This doctrine is a general one, which protects not only the United States, but the states. It is not necessary for us to enter into the controversy as to the location of sovereignty where there is a union of states and of the people in these states. Fortunately, most Americans would have a ready answer. Those who wish can consult Bliss on Sovereignty and other works accessible. It is enough for us that there are sovereign powers in the nation, and some sovereign powers in the state. "It is the theory of our system of government that the state and the nation alike are to exercise their powers respectively in as full and ample a manner as the proper departments of government shall determine to be needful and just, and as might be done by any other sovereignty whatsoever. This theory by necessary implication excludes wholly any interference by either the state or the nation with

an independent exercise by the other of its constitutional powers. If it were otherwise neither government would be supreme within what has been set apart for its exclusive sphere, but, on the other hand, would be liable at any time to be crippled, embarrassed and perhaps wholly obstructed in its operations at the will or caprice of those who, for the time being, wielded the authority of the other. And that an exercise of the power to tax might have that effect is mainly from a consideration of the nature of the power. Any 'power which in its nature acknowledges no limits,' and which, even in a lawful and legitimate exercise, may be carried to the extent of an absolute appropriation of property or destruction of the franchise or privilege upon which it is exerted must, as a power of one sovereignty, be incapable of being admitted within the jurisdiction of another for exercise at the discretion of the power wielding it. And the state and the nation having each their separate and distinct sphere within which they are permitted, by the fundamental law, to exercise independent authority the principle which excludes from one sovereignty the taxing power of another is as much applicable within the American union to the taxation of state and nation respectively as it is elsewhere:" Cooley on Taxation, 2nd ed., page 83.

"The taxing power of the United States is, in like manner, subject to an implied restraint arising from the existence of powers in the state which are obviously intended to be beyond the control of the general government. Hence, Congress cannot tax the courts, the municipal corporations or other agencies of a state, nor the salaries of its officers or judges; and the revenue and public domain of the states are, for like reasons, equally exempt whether held directly or through individuals or bodies corporate acting by virtue of an authority conferred for governmental purposes:" Hare, 265.

In *Bank of Commerce v. New York City*, 2 Black (U. S.), 620, Mr. Justice Nelson said: "Their powers (the powers of the state and general government) are so intimately blended and connected that it is impossible to define and fix the limit of the one without at the same time that of the other in respect to any one of the great departments of government.

When the limit is ascertained and fixed all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides a conflict of authority need not occur or be feared."

In *Warren v. Paul*, 22 Ind. 276, it was held that writs in state courts did not require a United States revenue stamp. Perkins, J., said: "State governments . . . are to exist with judicial tribunals of their own. This is manifest all the way through the Constitution. This being so, those tribunals must not be subjected to be encroached upon or controlled by Congress. This would be incompatible with their free existence. . . . There must be some limit to the power of Congress to lay stamp taxes. Suppose a state to form a new or to amend her existing Constitution, could Congress declare that it should be void unless stamped with a federal stamp? Can Congress require state legislatures to stamp their bills, journals, laws, etc., in order that they shall be valid? Can it require the executive to stamp all commissions? If so, where is he to get the money? Can Congress compel the state legislatures to appropriate it? Can Congress thus subjugate a state by legislation? We think this will scarcely be pretended. Where, then, is the line of dividing power in this particular? Could Congress require voters in state and corporation elections to stamp their tickets to render them valid?"

Official bonds given to a state by its officials are documents essential to state agencies, and, therefore, independent of the federal taxing power: *State v. Garton*, 32 Ind. 1.

*Collector v. Day*, 11 Wallace, 113, is the case of an attempt to collect a United State tax on the salary of a probate judge of Massachusetts. It was held beyond the power of Congress to authorize such a levy. This decision must have disturbed the revenue officials, since three years later we find another such attempt, in New York city, in 1873: *Freedman v. Sigel*, 10 Blatchford, 327.

Since municipalities exist for the better fulfillment of state purposes, their revenues partake of the same exemption. An

Act of Congress taxed railroad bonds, and required the companies to pay the tax. The Supreme Court held that the payment was not demandable in the case of bonds owned by the city of Baltimore: 17 Wallace, 322.

In the Georgia circuit there was the case of a railroad owned and operated by the state. The property was held to be free from the United States tax law: *Georgia v. Atkins*, 1 Abb. (U. S.) 22.

In the war revenue law of 1898, we find provisions which we submit are contrary to the intent of the United States Constitution. The Constitution is the supreme law of the land, and it is as supreme in its preservation of local or state rights and agencies as it is in its creation of national powers. Both the reservations and the creations are protected by its control, and no one can say that he will ignore the Constitution so far as it respects the spheres of operation reserved to the states. There is a healthy doctrine of state rights, as well as a destructive one, and if we condemn the one yet the other we may cherish as recognized and favored by the sublime Constitution. By the war revenue law, legacies and other successions to the personal estate of a decedent, when the estate held for the benefit of the beneficiaries equals \$10,000, is subjected to taxation as follows:

If held for lineals, or brothers or sisters, . . . . .	.75c. per 100		
Descendants of brothers or sisters, . . . \$1.50		"	"
Uncles, etc., . . . . .	3.00	"	"
Brother, etc., of grandparent, . . . . .	4.00	"	"
Others, . . . . .	5.00	"	"

Husband or wife of decedent is exempt.

Where the personal estate thus held exceeds \$25,000, at a rate one and a half times as much as above.

Where it exceeds \$100,000, twice as much.

" " " 500,000, two and a half times as much.

" " " 1,000,000, three times as much.

If other means of collection fail, the proper official may sell the property and thus secure the tax to the United States.

What is this tax? The collector would say that it is upon the property. It is not, however, upon such property in common with all other property of the kind. If it were, then Congress could very well tax it, subject to the provisions in the Consti-

tution respecting direct taxation and uniformity, so far as they may be applicable. The taxation, however, is not on all property. Certain funds and estates are singled out and taxed for the reason that they have been the subject of the inheritance laws of the state. This is clearly an interference with the inheritance prescribed by the state.

If the State of Pennsylvania were to enact a law that all blacksmiths should pay a license of \$25 a year, but that all smiths who made use of patent bellows should pay \$250 a year; or if it should enact that attorneys-at-law should pay \$50 a year, but that all those who had been admitted to the federal courts should pay \$300 a year; or if it should enact that on all sewing machines there should be paid \$5 a year, but that on sewing machines on which patents were in force there should be paid \$25 a year, such legislation would be recognized as prejudicial to the rights and interests which the United States Constitution undertook to promote or to protect. If a publisher were taxable at a certain rate, but if he published books on which he or his author had a copyright then at a greater rate, the opposition between the state policy and the policy of the Constitution would be apparent.

When, then, is the difference when we come to inheritance? The United States cannot tax inheritance as such, without disturbing the policy of the state. It is the right of the state to control and to regulate inheritance. There have been certain extremes advocated in behalf of state regulation with which we have nothing to do. Whether they are sound or unsound, the fact remains that regulation and distribution are acts of sovereignty. The collector might reply that the legacies, etc., are not especially marked out for taxation, since conveyances or successions *inter vivos* by means of deeds, etc., are taxed. This reply would not be satisfactory. The rates of taxation are different, and could hardly be otherwise. If we class legacies, etc., with successions *inter vivos*, the burdens should have some degree of equality. This is not so with the present legislation. Deeds *inter vivos* are subject to a tax of something like one-half of one per cent. Successions from decedents, which originate not by deed but by the law

of the commonwealth, are subject to a rising scale ranging from seventy-five cents to five dollars. This, however, is not the chief fallacy in such a reply. The truth is there is nothing in common between the two classes of successions. The one is strictly private, and involves no franchises or governmental privileges. The other is public, originating by the will of the state. A railroad company chartered by Congress may be taxed in common with other railroads chartered by the state. This is because they can be classed together, so far as property taxation is concerned. Their conditions are such that a state taxation will not interfere with the design of Congress. Whether a state taxation may not sometimes be so severe as to cripple a railway, and on that account entitle it to call for relief from the federal courts, may possibly be a question, some day. The conditions attendant on succession by reason of legacies or of inheritance laws are otherwise. They cannot be taxed by Congress except to the disarrangement of the plans of the state. Suppose at a future time a Congress should be elected who should be composed of men who were of opinion that great fortunes were a national ill, and that they could justly be taxed at enormous rates. Would not this be an interference with a state policy the other way? Perhaps constitutional provisions in respect to uniformity would prevent such a disturbance of the inheritance laws. The fact that, if not prevented, it would be a disturbance, is enough, however, to show that such legislation is beyond the contemplation of the Constitution.

In volume 34 of this journal, at page 179 *et seq.*, authorities are collected showing how the right to take by succession and testament is derived from the state. One of these decisions is in *Strode v. Commonwealth*, 52 Pa. 182. It would be advantageous to read those authorities in close connection with the present pages, but it would be a mere reprint to reproduce them here.

If successions or inheritances were within the province of Congress, we in Pennsylvania would be very quickly told that we were interfering with national rights and policies, did our legislature attempt to tax all estates in Pennsylvania held



under the Act of Congress for the benefit of legatees. Suppose state taxation of distribution under French Spoliation claims was attempted. See *Kingston's Estate*, 28 W. N. C. 284.

In this paper, nothing has been said in respect to provisions of the Constitution in regard to direct taxes and to uniformity of taxation. It is a satisfaction to know, however, that these provisions have received thorough and able presentation by distinguished counsel in *High v. Coyne*, 93 Fed. 450—now in the United States Supreme Court—and will no doubt be carefully considered by counsel in other cases.

*Luther E. Hewitt.*

## A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART VI.

The convention was now a week old. Let us see what progress had been made. It had been expressed as the sense of the convention that a National Government, consisting of a Supreme Legislative, Executive, and Judiciary, ought to be established; and that in the legislature there should be proportionate representation of some kind, for, although this resolution was not passed, in deference to the delegation from Delaware, it was clearly the view entertained by a majority. Also, that the legislature should consist of two branches. How the members of the second or upper branch were to be chosen was not determined. Either branch of the legislature was to have power to originate acts, and all the powers of existing Congress, with the further power of legislating whenever the state legislatures were incompetent to do so, and also the power to negative state enactments contravening the articles of Union, etc.

The question as whether the National Legislature should have the right to authorize the use of force against a delinquent state was postponed. Of course, the definite action—the settling upon the exact phraseology of, and adoption of, parts of a *Constitution*—had not begun. But the general principles upon which the constitution was to be framed were laid down—in part, at least—in the very first week, and no thoughtful observer can fail to note the immediate and radical departure from the lines on which the articles of confederation were drawn; it would have been idle to attempt to incorporate sections embodying the principles laid down as amendments to these articles—the whole scheme was generically different.

The second week began with the consideration, in Committee of the Whole, of the seventh resolution in the plan, viz. :

“ That a National Executive be instituted, to be chosen by the National Legislature for the term of ——— . . . , and to be ineligible a second time; and that, besides a general

authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the confederation."

It will be noticed that the resolution calls the Executive "It," leaving the question as to whether the Executive should be one man or a dozen entirely open. There was no disagreement as to the necessity for such an Executive, and the first clause, viz. : "That a National Executive be instituted," was quickly passed. The remaining important questions in the resolution, were : 1. Should the Executive be a "unity or a plurality?" 2. By whom should it be chosen? 3. How long should it serve? 4. Should it be ineligible a second time? 5. What should be its powers? The first discussions were as to its "unity or plurality," but no immediate action was taken. Mr. Madison then introduced the subject of its powers. He moved to substitute for the words of the resolution, after "instituted," the following : "with power to carry into effect the national laws, to appoint officers in cases not otherwise provided for, and to execute such other powers not legislative nor judiciary in their nature, as may from time to time be delegated by the National Legislature." The words "and to execute such other powers," etc., were stricken out as unnecessary, leaving the office in the strictest sense an Executive one for the purpose of carrying out national laws, with no participation in the making of those laws, still less any veto upon them.

Up to this point, there is evident a realization of the necessity for an Executive, but an unwillingness to make it a strong one; the horror of monarchy, or any semblance of it, was still present in people's minds. With regard to the manner in which the Executive should be chosen—the number of its members being still undetermined—Mr. Wilson started the debate by expressing a wish that it might be by the people—a sentiment with which Mr. Sherman was not at all in sympathy. He wanted the Executive to be appointed by the National Legislature, and absolutely dependent on it. Independence of it would be "the very essence of tyranny."

Pausing for a moment to fix upon seven years as the term of service of the Executive, and to make it ineligible a second

time, the question as to how it should be chosen was resumed, and a definite proposition was submitted by Mr. Wilson. (Thus early, but unconsciously, suggesting practically the method later adopted finally :) "That the states be divided into \_\_\_\_\_ districts and that the persons qualified to vote in each district for members of the first branch of the National Legislature elect \_\_\_\_\_ members of their respective districts to be electors of the Executive Magistracy; that the said electors of the Executive Magistracy meet at \_\_\_\_\_ and they, or any \_\_\_\_\_ of them, so met, shall proceed to elect by ballot, but not out of their own body, \_\_\_\_\_ person, in whom the executive authority of the National Government shall be vested. He advocated openly and squarely the derivation of both legislative and executive from the people, so that they might be independent of each other and of the states. In other words, he was for a National Government of, for, and by, the people as a whole. And Mr. Gerry agreed with him in principle, but thought that the community was not yet ripe for so unified a government, and did not yet realize the necessity for it. Mr. Wilson's motion was lost by a vote of eight to two—only Pennsylvania and Maryland favoring it—but the suggestion to elect by state legislatures was passed over also, and the elections by the National Legislature was determined on by the same vote. A question of great importance in this connection, upon which the original resolution was silent, was now brought forward by Mr. Dickinson, viz. : the removability of the Executive. His suggestion was—and he so moved—that it should be "removable by the National Legislature, on the request of a majority of the legislatures of the different states." This brought the states as such once more upon the scene, and was expressly intended to do so, Mr. Dickinson declaring that he had no mind to abolish the state government, as some gentlemen seemed inclined to do. Messrs. Sherman and Mason crossed swords over the former's suggestion that the Executive should be removable at pleasure by the National Legislature—a monstrous proposition, justly characterized by Mason as "a violation of the fundamental principle of good government." An objection to Mr. Dickinson's idea was clearly pointed out by

Mr. Madison and Mr. Wilson, viz. : that it would give the small states the power to keep in office an unfit Executive against the wish of a great majority of the people. The mover of the resolution, representing a small state, was not terrified by his prospect, and proceeded to lay down unreservedly and fully the anti-national position. His remarks are very instructive, as summarized by Madison. He admitted the desirableness of mutual independence in the branches of the government, but declared that a "*firm executive*," could only exist in a limited monarchy. It was not compatible with republican institutions—one source of the stability of which in America, was the double-branched legislature, and the other the division into distinct states, which ought to be maintained and considerable power left to the states ; "without this, and in case of a consolidation of the states into one great republic, we might read its fate in the history of smaller ones.

In other words, he favored practically the formation of a new league, and considered a republican form of government impossible for a consolidated community. But his own state alone voted for his resolution, and, instead of it, the Executive was made, as before stated, ineligible a second time "and removable on impeachment and conviction of mal-practice or neglect of duty."

Upon the question of "unity or plurality," which was now taken up, Messrs. Rutledge and C. Pinckney moved that the blank for the number should be filled with the words "one person," adding that the reasons for a single person as Executive were so conclusive that they supposed that no one would oppose the motion, whereupon Mr. Randolph at once arose and combatted it "*totis viribus*"—it savored of monarchy and of centralism. However, after a little discussion, a single Executive was decided upon, by a vote of seven to three. Realizing that it would hardly do to leave the National Legislature free to pass laws without any check, the drawers of the Virginia resolutions had provided for a "council of revision," to be composed of the Executive and a convenient number of the National Judiciary, who should have power to negative

any act of the National Legislature or a negative thereby of the act of a particular legislature. And to overcome this dissent, the act or negative must be again passed by a vote of——— members of each branch of the National Legislature. The consideration of this proposition occasioned a warm debate, precipitated by Mr. Gerry's proposed amendment leaving the judiciary out, and giving the negative, qualified as above, to the executive alone. Again the spectre of monarchy rose upon the vision of some of the delegates—the more clearly as Mr Hamilton moved to strike out the restrictions upon the negative and make it absolute. The proposition conjured up in the mind of Mr. Butler the image of an American Catiline or Cromwell. And Mr. Mason was so utterly opposed to the idea that he wanted the legislature to be wholly unrestrained, and the suggestion of Mr. Hamilton was unanimously voted down. It was now proposed to give the Executive the power to *suspend* a legislative enactment for the term of———; but this, though proposed by Mr. Butler, and seconded by Dr. Franklin, was also unanimously negatived. The blank in Mr. Gerry's motion was now filled by inserting "two-thirds," and the motion of Mr. Gerry was passed, eight to two. The subject was postponed for a day or two upon notice by Mr. Wilson and Mr. Madison that they proposed to move to reconsider and to amend Mr. Gerry's motion by restoring the provision of the Virginia resolution as to joining with the Executive a convenient number of the National Judiciary, and as such a judiciary had not as yet been determined on, it was resolved, *nem. con.*, that it be established. Two days later, on Wednesday, June 6th, Mr. Wilson accordingly moved to reconsider and amend. The advocates of the joinder of the judiciary with the Executive argued that it would be at once a support to and a check upon the Executive, and would bring to bear upon the passage of laws the wisdom of the judiciary. On the other hand, Mr. Gerry thought the duty properly executive, and that if alone he would better perform the duty, than he could if "*seduced by the sophistry (!) of the judges,*" and it seemed to a majority that the function was not properly exercisable by the judiciary, so the amendment was rejected

by a vote of eight to three. The Virginia resolutions provided that the judiciary—one supreme tribunal and one or more inferior tribunals—should be chosen by the National Legislature. This was opposed as unwise, leading to intrigue, etc. Mr. Wilson thought the executive should have the appointment, not so Mr. Rutledge, who brought the “King” upon the scene once more. The question being important, and not one to be decided off-hand, the convention contented itself with merely striking out the provision for choice by the legislature, leaving a blank to be filled subsequently.

They then agreed, apparently without debate, to the resolution “that provisions ought to be made for the admission of states, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.” Before agreeing to guarantee them a republican form of government, Mr. Patterson, of New Jersey, thought the question of representation should be decided, and moved to postpone, which was agreed to. There remained but four of the Virginia resolutions: providing respectively for the continuance of the present Congress, “until a given day after the reform of the articles of union shall be adopted;” for a provision for amending the articles of union *without the assent of the National Legislature*; for the binding of the state officials by oath to support the said articles, and for the submission of the articles to assemblies recommended by the several legislatures, to be expressly chosen by the people for the purpose of passing upon them. The first of these passed without debate, the second and third were postponed for consideration later, and the latter occasioning some debate, Mr. Madison strenuously urging the necessity of resting the new Constitution upon the “supreme authority of the people themselves.” The resolution was postponed. The convention—I use the term for convenience, though all these proceedings were in Committee of the Whole—had now entirely gone over the Virginia resolutions once, and had passed upon, or at least discussed, the whole scheme of new government as therein laid down. The debates up to



this point had been participated in by comparatively few members—less than one-third of them—and not more than a dozen had taken a really active part. Mr. Rutledge, indeed, called attention to the “shyness” about giving expression to their views, on the part of a majority of the members. All sections of the country, however, had participated, and a very fair idea of the general thought of the people can thus be gathered from the debates. It is interesting to note the changed attitude toward important questions and principles which the upheaval of the years just passed had produced. It will be remembered that in the Congress of 74–75, there were frequent protests of loyalty to the king, and of devotion to the empire—indignant denials in Congress and out of it of a design to establish an independent government. As late as July, 1775, in an address to the king, before quoted, the delegates say, that the colonists are “attached to your majesty’s person, family, and government, with all the devotion that principle and affection can inspire, connected with Great Britain by the strongest ties,” etc., etc. All their reprobation was reserved for and bestowed upon the ministry and parliament! Now, twelve years later, the very idea of monarchy is abhorrent to them; they are ludicrously afraid of any thing savoring of it in the remotest degree. One would suppose that they had become convinced that all their former woes flowed from the form of government of Great Britain—*i. e.*, a monarchy. They seem to forget that they had previously attributed them to the *Cabinet* and *Parliament*, and take no account of the personality of George III., but only of his kingship. Since their severance from Great Britain, they had suffered, as was freely stated on the floor of the convention, from an over-dose of Democracy—witness occurrences in Massachusetts and Rhode Island—and altogether they were between “the devil and the deep sea,” in endeavoring to construct a government that would embody the principle of “liberty,” of which the people at large were so greatly enamored, with that of “order,” so dear to the minds of statesmen, so essential to any government deserving the name. When we consider the different spirit in which the whole task of the convention

was approached by its various members, not only as to the relative importance of "order" and "liberty," but as to the degree of union—oneness—it was desirable to bring about (perhaps, after all, only another phase of the same question), it is little short of marvellous that a practical agreement as to the general nature of the new government should have been reached so early; why, the convention was not yet two weeks old, and yet a whole suggested plan had been gone over, and its more important and leading features determined on! This is not the less surprising because much that was done was afterwards undone; some of it—much of it—remained practically to the end. We can all see more than traces of the "Virginia plan" in the Constitution.

Having gone over all the resolutions once, the convention proceeded to take up anew some of the provisions, with a view to their modification or omission. Mr. Rutledge moved a reconsideration of the vote by which a national judiciary of *inferior* tribunals in addition of the Supreme Court had been determined on. He argued that the state courts could perform all the functions of these tribunals, and that the establishment of inferior national tribunals would be an encroachment upon the jurisdictions of the states; let appeals be taken from the state courts to the National Supreme Court. It was answered that if there was to be a National Executive and Legislature there should be a National Judiciary, and that admiralty jurisdiction should be wholly confined to it. Of the necessity of such a judiciary, Mr. Dickinson—*mirabile dictu!*—was as strongly convinced as was Mr. Madison. But the majority was against them, and the motion of Mr. Rutledge prevailed; but in spite of a warning by Mr. Butler that the people would not accept such an innovation, and that the convention must give them the best government they would *take*—not the best it could devise—a motion was carried giving the National Legislature the *power* to appoint such tribunals without directing it to do so.

They now returned to the question of the manner in which the members of the first or lower house of the National Legislature should be chosen; and Mr. Pinckney started the ball

rolling by moving that it should be chosen by the state legislatures instead of by the people. He did not consider the people fit to choose the best men, and also thought, in line with Mr. Butler's warning, that the legislatures would hardly be likely to "promote the adoption of the new government if they were excluded from it." The interesting debate which followed gives a very clear idea of the views of the general subject which prevailed at the time, and they are less divergent than one would suppose. The two extremes which were, it must be confessed, pretty far apart, were represented by Mr. Sherman on the one hand and Mr. Read on the other. Mr. Sherman thought that unless it were proposed to abolish the state governments, election by these governments was necessary to preserve harmony between them and the National Government. He declared that the objects of the Union were few: defence against danger from abroad; against internal disputes and resort to force; treaties with foreign nations; and the regulation of commerce. These and a few lesser objects alone rendered a confederation of the states necessary. In Mr. Read's opinion, too much attachment was manifested to the state governments, and the members must look beyond their continuance. They would, of necessity, be eventually "swallowed up" by the National Government, and reduced to the mere office of electing the senate. It was worse than useless to try to patch up the old federal system. "If we do not establish a good government on new principles, we must either go to ruin or have the work to do over again." And he added his conviction that the people were not averse to a general government.

*Lucius S. Landreth.*

(To be Continued.)

## PROGRESS OF THE LAW.

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AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE  
REPORTS.

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### BANKRUPTCY.

A judgment for the payment of alimony, obtained by a bankrupt's wife against him, is a "debt" under § 17 a of the Judgment for Alimony Bankrupt Act, which is provable against the bankrupt; therefore the wife will be enjoined from prosecuting her judgment to satisfaction in a state court: *In re Van Arden*, 96 Fed. 86.

In Georgia an unrecorded mortgage is good as against the mortgagor and all persons except subsequent purchasers and incumbrancers. The present bankrupt, residing in Georgia, executed a mortgage on September 15, 1898. The mortgage was entered for record on January 19, 1899, at 4 P. M., and on the same day, at 5.45 P. M., a petition for voluntary bankruptcy was filed. Held, that the mortgaged property passed to the mortgagee on September 15, 1898, and the transfer was therefore more than four months previous to the filing of the petition: *In re Wright*, 96 Fed. 187.

The general manager of a corporation, who has charge of the whole business of the corporation at a salary of \$100 per month, is not one of the "workmen, clerks or servants" who are entitled to priority of payment under § 64 b of the Bankrupt Act: *In re Grubb-Wiley Co.*, 96 Fed. 183.

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### BILLS AND NOTES.

The Supreme Court of California has announced its adherence to the now well-settled rule of the law merchant which requires an indorsement of a negotiable instrument to be upon the instrument itself. Whether a valid indorsement may be made upon the face of the instrument is perhaps an open question and was not decided by the court. In the present case a note and mortgage had been assigned to the plaintiff by separate instruments in writing. Held, that while the assignor's title passed, yet

## BILLS AND NOTES (Continued).

the assignee did not become a holder of the note under the commercial law, and was liable to be met by the defence of want of consideration on the part of the maker: *Hays v. Plummer*, 58 Pac. 447.

In an action against an executor on a promissory note made by his testator, the defence was payment. It was shown that **Presumption of Payment** the testator was indebted to the plaintiff in other ways besides being liable on the note, and that he had given to the plaintiff his note and mortgage for a sum which would just about cancel his liabilities to the plaintiff, including his liability on the note now the subject of the action. However, the executor was unable to show that the testator had given the mortgage for the purpose of paying off the note held by plaintiff. The Supreme Court of California very properly held that the executor had failed to sustain the burden of proving that the payment by the testator was intended for, and accepted as, a payment of the note in suit: *Griffiths v. Lewin*, 58 Pac. 205.

## CONSTITUTIONAL LAW.

The Circuit Court (D. New Jersey) has declared void, as regards certain cases, the New Jersey Act of March 30, 1897 (Laws 1897, p. 124), which provides that no action **Act Depriving Corporation Creditor of Remedy Against Stockholder** may be brought in any New Jersey court by a creditor of a corporation to enforce a stockholder's liability arising in a foreign jurisdiction, save an equitable proceeding, allowed by the statute, for the benefit of all the creditors. In *Western Nat. Bank v. Reckless*, 96 Fed. 70, the plaintiff became, in 1892, a creditor of a Kansas corporation, organized under a law of Kansas which provided, *inter alia*, that after the creditor had obtained a fruitless judgment against the corporation, he might sue any stockholder for an amount equal to the value of his stock. Plaintiff brought this action against the defendant, a stockholder of the corporation residing in New Jersey, in the Circuit Court of the United States for the district of New Jersey, and was met, of course, by a plea setting up the above act of 1897.

The opinion of Judge Gray, ordering judgment for the plaintiff, establishes the following propositions: (1) That the obligation of the defendant, created under the Kansas statute, was

## CONSTITUTIONAL LAW (Continued).

transitory and could be enforced in any jurisdiction by any competent court; (2) That the act of 1897 was binding upon the Federal courts of New Jersey, as well as the state courts; (3) That the relation between the plaintiff and defendant was a contract relation, after plaintiff had recovered judgment against the Kansas corporation; (4) That the act of 1897 deprived the plaintiff of an integral portion of the remedy, whereby he could enforce his contract, and the deprivation of his direct right of action was not compensated for by the equitable proceedings allowed under the statute; (5) That therefore the act of 1897 was unconstitutional as impairing the obligation of plaintiff's contract.

## CORPORATIONS.

The Supreme Court of Illinois has placed itself squarely in line with the position taken by the Supreme Court of the United States in regard to the liability of a corporation, when it sets up the invalidity of one of its own acts on the ground that it is *ultra vires* of itself, to be met by the answer that it has taken the benefit of the act and is estopped from setting up its own lack of power. Thus in *Nat'l Bldg. & Loan Ass'n v. Home Savings Bank*, 54 N. E. 619, it was held that a building and loan association, which had made a contract beyond the scope of its charter, was not estopped from setting up its invalidity by the fact that it had reaped the benefits of the transaction. The distinction was emphasized between acts *ultra vires* of the corporation itself and acts of the corporation officers which were irregular, but which could be ratified by the stockholders. In the one case the invalidity could be pleaded, in the other case it could not. In order to make its opinion on the subject clear, the court quoted several pages from *Cent. Transp. Co. v. Pull. Pal. Car Co.*, 139 U. S. 24, and *Thomas v. R. R. Co.*, 101 U. S. 71, and definitely announced the doctrines therein expressed to be the law of Illinois. Carter, J., dissenting, announced his adherence to the Pennsylvania doctrine; that the corporation is estopped from pleading *ultra vires* whether the act is beyond the power of the corporation itself, or merely irregular in that an agent of the corporation has exceeded his authority, and that, after the corporation has received the benefit of the act, the state is the only party competent to raise the question of its validity.

Perhaps no question presents greater difficulty than that of the status of a stockholder in an insolvent corporation, when

## CORPORATIONS (Continued).

**Right of Stockholder to Rescind his Contract of Subscription after Insolvency** his subscription has been obtained by the fraud of the officers of the corporation. Has he a defence to an action by the receiver for unpaid subscriptions, and if so, on what grounds? The question generally arises in the suit by the receiver against the stockholder, but in *Tierney v. Parker*, 44 Atl. 151, it was substantially presented in an action by the stockholder against the receiver to rescind his contract of subscription. It appeared that the stockholder had been induced to subscribe in 1889 through the fraudulent representations of the president of the corporation; that he had received notice of the fraud in 1890; that the receiver had been appointed in 1893; and that not till then had the stockholder made any effort to rescind, when he brought this bill. Upon these facts the Court of Chancery of New Jersey held that the stockholder had possessed the right of rescission when he first discovered the true facts, but that he had lost his right through his delay of three years in asserting it. Although the decision of the court expresses the rule adopted in several jurisdictions, yet there is a growing feeling of approbation for the English rule that the liability of the stockholder becomes absolute upon the insolvency of the corporation. Whether this liability results from an estoppel created by the stockholder by the mere fact of his name appearing on the books, or whether it arises from the doctrine that the principles of partnership law apply to a case like this is a question yet to be decided by the courts.

## CRIMINAL LAW.

In *In re Breton*, 44 Atl. 125, the petitioner was convicted upon two complaints for illegally keeping intoxicating liquors, and received a sentence of sixty days imprisonment in each case. It was not stated which imprisonment should be suffered first, nor that sentence in either case should begin at the expiration of the sentence of the other. After serving sixty days the petitioner applied for his release.

The Supreme Court of Maine ordered his discharge, holding that, in the absence of statutes, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time will run concurrently, and the two punishments will be executed simultaneously. Citing 1 Bish. Crim. Proc. 1310.



## CRIMINAL LAW (Continued).

In *State v. Nordstrom*, 58 Pac. 246, the appellant had been convicted of murder in the first degree. After his case had been taken twice to the Supreme Court of the United States, together with sundry appeals to the various courts of Washington and the Circuit Court of the United States, he was finally sentenced to be hanged. After his sentence, his counsel suggested to the court of conviction that he had become insane, and the court, of its own motion, appointed a committee of physicians to examine the appellant, which committee reported that he was sane. His counsel then moved to have the question of his sanity submitted before a tribunal where he could be represented by counsel. This motion was dismissed, whereupon an appeal was taken to the Supreme Court of Washington. The latter court, following *Laros v. Comm.*, 84 Pa. 200, and *Webber v. Comm.*, 119 Pa. 223, dismissed the appeal on the ground that it was not a matter of right, but vested wholly in the discretion of the trial court. Whether the prisoner has taken any further appeals does not appear from the report.

## DAMAGES.

In *McBride v. Sunset Telephone Co.*, 96 Fed. 81, the plaintiff brought an action against the telephone company for failure to deliver a message to him, alleging, as his basis for damages, that by reason of the non-delivery of the message, he was not informed of the death of his child, and that his apparent outrageous conduct, in remaining away from his family at the time, had caused them to become estranged from him and to refuse to associate with him, and also that he had suffered great mental anguish. Held, dismissing plaintiff's complaint, (1) that mental suffering, by itself, does not furnish the basis for the recovery of damages, and (2) that in this case the estrangement of plaintiff's family was not the natural and probable consequence of the failure to deliver the message, and therefore could not support the action.

## DEEDS.

In a proceeding for a partition of a decedent's estate, the defendant claimed the land by virtue of a deed from the decedent to him. It was shown that the deed had been kept by the decedent in his private box at the bank and had never been delivered to the defendant.

## DEEDS (Continued).

The latter relied upon declarations of the decedent that he had intended the land for defendant, also upon the fact that the decedent had given defendant his key to the strong box, thus making a symbolical delivery to him of the deed contained within. However, the defendant was unable to clearly prove that the key had been given to him for the express purpose of transferring to him the possession of the deed, and that it was not done with the intention of giving him access to certain other papers. Held, that the defendant had, on the above facts, failed to sustain the burden of proving a delivery of the deed: *Walls v. Ritter*, 54 N. E (Ill.) 565.

## EQUITY.

In *Fahy v. Cavanagh*, 44 Atl. 154, the Court of Chancery of New Jersey dismissed a bill to compel the performance of a written contract to purchase real estate under the following rather peculiar circumstances:—The title of the vendor depended upon a will, drawn evidently by an illiterate man, which, after the devises and bequests, contained the following: “Ex-cetoras of the will, Valentine Burke, Cornelius McCue.” Underneath these names the signature of the testator appeared. At the probate of the will the testimony of Burke and McCue, who had written their names in the will, as above, clearly showed that the testator intended their signatures to be that of witnesses to his will, and that he did not intend to designate them as executors.

In the bill for specific performance, the Court of Chancery decided that the will was properly admitted to probate and that it passed the land under the New Jersey statute requiring subscribing witnesses, but the court refused to decree specific performance on the ground that the will, standing alone, was unwitnessed; therefore the vendor's title to the land depended upon his ability to call upon the witnesses at any time, since the probate of the will would not become conclusive against the heirs for a number of years. For these reasons the court concluded that the continued existence of the two witnesses was too frail a foundation upon which to build a decree of specific performance.

## ESTOPPEL.

A. and others, partners, trading under the firm name of A. & Co., owned stock in the B. corporation. In order to qualify

**ESTOPPEL (Continued).**

**Allowing Stock to Stand in Name of Another** A. to act as one of the directors of the corporation, the stock was allowed to stand as in A.'s name. One of A.'s creditors endeavored to attach the stock as the property of A., and claimed that A. & Co. were estopped from setting up their ownership. Held, (1) that in absence of proof that the creditor knew that the stock was in A.'s name and acted upon such information, he could not set up the estoppel; (2) that a representation by A. to the creditor that he was the owner of the stock was insufficient to raise an estoppel against A. & Co., although it might as against A.: *N. Y. Comm. Co. v. Francis*, 96 Fed. 267 (Circ. Ct., N. D. Conn.).

**EVIDENCE.**

The Supreme Court of Indiana has decided that where the question at issue is the competency of a person for a certain duty, evidence of specific acts of negligence on his part is admissible to show that he is incompetent. Thus in action against a railroad company to recover for injuries alleged to have been received by the plaintiff from a doctor in the defendant's hospital, where plaintiff was being treated, the fact that, about that time, the doctor had performed an operation upon another person in a negligent and unskillful manner, was held to be relevant upon the question of the doctor's competency to act in his position: *Wabash R. R. Co. v. Kelley*, 54 N. E. 752.

It is well settled that where a witness has testified to certain facts which lead to an inquiry as to other facts, the witness may be cross-examined as to these latter facts, even though their effect is to incriminate him, and he cannot set up his constitutional privilege as a bar. But where the issue consists of a number of separate transactions, the mere fact that he testifies as to one does not lay him open to incriminating cross-examination upon the others, even though the transactions are all of the same character. This distinction is well illustrated by *Evans v. O'Connor*, 54 N. E. 557, an action for the seduction of plaintiff's wife. The plaintiff proved acts of adultery committed by his wife by the defendant in 1893, 1894 and 1895. The wife was called by the defendant and desired to testify as to her relations with the defendant in 1893, but not as to those in 1894 and 1895. She was instructed by the trial judge that if she testified as to matters in 1893, she could be cross-exam-

**EVIDENCE (Continued).**

ined fully as to 1894 and 1895, and her constitutional privilege would be considered as waived; whereupon she refused to testify. The ruling of the trial judge was held, error, by the Supreme Court of Massachusetts on the grounds above stated, namely, that the acts of adultery in 1894 and 1895 were wholly unconnected with those of 1893, even though they were material to the issue. The language of Justice Shepley in *Low v. Mitchell*, 18 Me. 372, was quoted with approval.

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**INSURANCE.**

In *Kettenring v. N. W. Masonic Aid Ass'n*, 96 Fed. 177, an action was brought upon a policy which provided that "no suit at law or in equity shall be maintainable . . . . unless the same shall be commenced within twelve months after the death of said insured." The suit was not brought until twelve months and fifteen days after the death of the insured, but the plaintiff sought to excuse his delay on the ground that there was another clause in the policy providing that the money should be paid within ninety days after the proof of death had been received; that the true intention was that the twelve months should run from the expiration of the ninety-day period, so as to give the beneficiary twelve full months in which to sue. Following the weight of authority, Judge Kohlsaat held that the limitation clause was plain and unambiguous, and he dismissed the plaintiff's complaint.

The question of construction of the so-called "American clause" in marine policies has recently come before the Supreme Court of Massachusetts. The clause in question, contained in a policy issued by the defendant company, read as follows: "Other insurance upon the premises aforesaid, of date the same day as this instrument, shall be deemed simultaneous herewith, and the said company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured, to the aggregate of such simultaneous insurance."

The above policy was issued on August 2, 1895, and another policy was taken out on the same cargo, dated and issued August 14, 1895. However, by their terms, both policies went into effect on August 21, 1895, at noon. Were these policies of "even date?" The court decided that they were not; that the above clause referred solely to the date of the execution of the policies; and the mere fact that they went into effect simulta-

## INSURANCE (Continued).

neously was immaterial: *Carleton v. China Mut. Ins. Co.*, 54 N. E. 559.

Actual delivery of a policy of insurance to the insured is not necessary in all cases to complete the contract. Thus in *Crawford v. Trans-Atlantic Ins. Co.*, 58 Pac. 177, the policy was prepared on April 30, 1897, as a result of the negotiations between the insured and the agent of the company. By its terms the policy was to go into effect on May 2d, at noon. On May 1st the agent sought the insured for the purpose of making the delivery, but was unable to find him, and retained possession of it on May 2d, which was Sunday, on which night the property was burned. The policy was deposited at a bank, and a few days later the insured tendered the premium and demanded delivery, which was refused. The Supreme Court of California held that the question of the completion of the contract was properly left to the jury, and that declarations of the agent, to the effect that the deal had been completed, were admissible to fasten the liability upon the company.

Delivery of  
Policy,  
Evidence

## JUDGMENTS.

The Court of Chancery of New Jersey has affirmed the familiar doctrine that a judgment *in personam* against a non-resident of a state without personal service is void under the fourteenth amendment to the Constitution of the United States. In the present case, a decree of divorce and alimony had been obtained in New Jersey against the defendant, who was then a resident of Missouri, without personal service. In an application for a *ne exeat* to prevent the defendant from leaving New Jersey without securing the payment of the alimony, it was held that the invalidity of the former decree, being based upon the want of jurisdiction of the court, could be successfully attacked in this collateral proceeding: *Elmendorf v. Elmendorf*, 44 Atl. 164.

Judgment  
without Per-  
sonal Service,  
Collateral  
Attack

## LIBEL AND SLANDER.

In *Sherwood v. Kyle*, 58 Pac. 270, it appeared that while the plaintiff, a schoolmistress, was sitting in the schoolroom with her pupils, the defendant entered the room and said to her, "You have no business to be in charge of young children. You are no more fit to teach school than hell is for a powder house." In an action for slander

Damages,  
Discretion of  
Trial Court

## LIBEL AND SLANDER (Continued).

the plaintiff recovered a verdict of \$1000. The trial court made an order granting a new trial unless the plaintiff would remit \$760, which plaintiff refused to do, and a new trial was ordered. From this order an appeal was taken. The Supreme Court of California held that the above facts would not justify them in interfering with the discretion of the trial court in the matter of damages, and the decision was probably correct, although one whose acquaintance with the case is limited to a reading of the report would be inclined to agree with the jury, rather than with the judge.

## MASTER AND SERVANT.

The Court of Chancery of New Jersey has properly decided that where a servant has been engaged by a firm to work in their manufactory, and the servant examines the books of the firm without the consent of his employers, such action on his part, not being connected with the work for which he is engaged, constitutes a breach of faith, and furnishes his master with a sufficient excuse for discharging him: *Allen v. Aylesworth*, 44 Atl. 178.

A mate of a ship is not a fellow servant with one of the seamen, so as to cause the latter to assume the risks of the mate's negligence. Also, the obedience by the seaman on board the ship at sea to the orders of the mate is not negligence, even though the seaman knows the danger. His is a duty of imperative obligation: *Keating v. Pacific Steam Whaling Co.*, 58 Pac. (Wash.) 224.

## NEGLIGENCE.

The Supreme Court of Kansas refuses to lay down a rule of law that a traveller upon a highway must stop before crossing a railroad, but it decides whether this duty is present upon the facts of each case. Thus where a traveller was approaching a track through a grove of trees bordered by a high hedge, and it was shown that he could not hear the train on account of the rustling of the trees, and that there was an opening in the hedge twenty-eight feet from the track, through which he could have had a clear view of the track if he had stopped, it was held that his failure to stop charged him, as a matter of law, with contributory negligence: *Atchison, Etc., R. R. Co. v. Willey*, 58 Pac. 472.

## NEGLIGENCE (Continued).

In *Lake Shore Rwy. v. Kelsey*, 54 N. E. 608, it appeared that plaintiff boarded one of defendant's trains; that the plat-  
**Standing on** form of the car was so crowded that he was un-  
**Crowded** able to get further than the lowest step; that he  
**Platform** stood there, clinging to the railings, and that his body projected such a distance out from the line of the train that he was struck by a train on the next track. The company contended, and, it would seem, with some reason, that the position assumed by plaintiff clearly showed contributory negligence on his part, but the Supreme Court of Illinois decided that the question of contributory negligence had been properly left to the jury.

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## PARDONS.

The Court of Appeals of New York has decided a rather curious case on the effect of a pardon. In *Roberts v. State*,  
**What the** 54 N. E. 678, the petitioner, who had been con-  
**Pardon** victed of burglary, was pardoned by the governor.  
**Imports** The legislature then passed a special act authorizing the petitioner to present a claim before the Board of Claims for damages sustained by his "improper conviction and punishment." When the case was heard by the board, the evidence showed clearly that the petitioner was guilty and had been justly convicted, and the petitioner's claim was disallowed. On appeal it was urged that the effect of the pardon was to declare that the petitioner was innocent, and the board had no right to hear evidence of his guilt. The Court of Appeals held that the effect of the pardon was, if anything, to declare the petitioner guilty, otherwise there would have been nothing to pardon; that the pardon relieved him from future punishment, but had no retroactive effect; therefore the petitioner had no claim under the statute, since his conviction was not "improper."

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## PLEADING AND PRACTICE.

In *Boardman v. Creighton*, 44 Atl. 121, an action was brought by a widow for the death of her husband, who had  
**Declaration** been killed by a fall of rock while working in the  
**for Negligence** defendants' quarry. The declaration alleged that the plaintiff "was then and there employed and was lawfully at work in the said defendants' quarry by the license and permission of said defendants and at their request." The lower court sustained a demurrer to the declaration, which ruling



PLEADING AND PRACTICE (Continued).

was affirmed by the Supreme Court of Maine on the ground that the declaration did not allege under what circumstances the decedent was in the quarry and what his relation was to the defendants; whether he was the defendants' servant or the servant of an independent contractor, or a mere licensee, since a different degree of care would be demanded of the defendants in each case.

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STATUTES.

The Washington Code (1881, § 812) provided that the rape of a child under 12 years of age should be punishable by life imprisonment or less, in the discretion of the court. In 1886 the age of consent was raised from 12 to 16 years. In 1893 the petitioner ravished a child under the age of 16 years, and subsequently the amendment of 1886 was held unconstitutional for the reason that its object was not expressed in the title. The petitioner applied for a writ of *habeas corpus* on the ground that he was sentenced and imprisoned under an invalid law. Held, affirming a judgment denying the writ, that the mere fact that the amendment was void did not render void the act of 1881 defining the crime and fixing the punishment, which had never been ousted by the unconstitutional amendment; therefore the criminal court had jurisdiction, and the regularity of its sentence could not be collaterally attacked on a petition for a writ of *habeas corpus*: *In re Nolan*, 58 Pac. (Wash.) 222.

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WILLS.

The testator bequeathed \$500 apiece "to the children of Dr. James B. Strafford." It appeared that the testator left a brother, Joseph B. Strafford, who was a physician, and a nephew, James B. Strafford, who was not. Since the difficulty arose only from the description of the legatee, the court decided that this was a case of a latent ambiguity, and admitted parol evidence to show that James B. Strafford, while not a doctor, had once been a clerk in a drug store, and was commonly known among his associates as "Dr." or "Doc." Upon this evidence the court decided that the intent of the testator was clear, and awarded the legacies to the children of James B. Strafford: *Atterbury v. Strafford*, 44 Atl. (N. J.) 160.

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NEGLIGENCE; WIDOW'S RIGHT OF ACTION FOR HUSBAND'S DEATH. *Adams v. N. P. R. R.*, 95 Fed. (Wash.) 938, (1899). This was an action for damages, brought in the District Court of the United States, by the widow of a man who had been killed through the negligence of the defendant company. The action was based upon the statute of the State of Washington, of which state deceased was a resident, corresponding to Lord Campbell's Act in England. At the time of his death, deceased was riding upon a "pass" which purported to release the defendant from all liability for injury. The court did not decide whether the deceased could

sign away his right of action in this way, holding the plaintiff's right of action to be *entirely distinct* from that which the deceased might have had if he had survived. The plaintiff was suing for the loss of "the support, protection, society and comfort" of the deceased; the deceased's action—if he had survived—would have been for the breach of the implied contract of safe carriage. This right of the plaintiff the court held could not be signed away by the deceased; she had been no party to the contract and had not authorized the deceased to act as her agent. Accordingly, judgment was given for the plaintiff.

The view that the widow's right of action is distinct in its nature, is laid down in almost all the courts. The United States Court adopted this view, in *Martin's Administrator v. B. & O. R. R.*, 151 U. S. 673 (696), decided in 1893; also in *The Oregon*, 73 Fed. 850 (1896). Massachusetts, New York, Pennsylvania, *Henderson v. P. R. R.*, 51 Pa. 315, (1863), and the majority of the states have given this interpretation to the statutes. But there is a great conflict of decisions upon the point, whether the right of action is entirely separate; that is, can the widow proceed under a new right and secure damage whether the husband's right was or was not enforceable? The decision in this case would appear to give her that right.

The Massachusetts courts make it an entirely independent right of action, not only enforceable when the husband's right might be barred: *Doyle v. Fitchburg R. R.*, 162 Mass. 70 (1894); but allow an action, by the personal representative, to recover damages suffered by the deceased in his life-time, and an action, for the benefit of the widow, to proceed at the same time upon these independent grounds and for different purposes.

*Bowes v. Boston*, 155 Mass. 349 (1892). In that state, there is a statute providing that "if by reason of the negligence of a corporation operating a railroad, etc., the life of a passenger is lost, the corporation shall be punished: Pub. Stat. C. 112, § 212. Under this act, the court holds this a penalty for a penal offence, paid to the next of kin instead of to the state: and as such entirely distinct from any right accruing to the injured party.

The New York rule seems to be that the widow's statutory right is of so distinct a nature from the injured party's, that she may maintain an action under the statute after his death, although he has previously recovered for assault and battery: *Schlichting v. Wintjen*, 25 Hun, 626 (1881). But in a previous case, the court declared that a widow could not maintain two separate actions as she can in Massachusetts, because the New York statute did not continue the personal action after death.

The English courts seem to hold this doctrine, also: In *Leggott v. G. N. Ry. Co.*, 1 Q. B. D. 600 (1876), it was held that the widow who has sued under Lord Campbell's Act and recovered, could, at a later date, bring suit for the benefit of the estate. So entirely distinct did they consider the two actions that the defend-

ant company was not estopped from denying matters of fact found in the previous case.

There is a Kansas case reported (53 Pac. R. 461, 1898), which exactly agrees with the decision in *Adams v. R. R.*, laying down the same doctrine of an independent action.

The rule is different in other states. In Indiana, the court holds that the statute merely continues the common law action; and a recovery by the injured party is a bar to any subsequent proceeding: *Hecht v. O. & M.*, 132 Ind. 508 (1892). In Pennsylvania the court adopts the idea that the cause of action is separate, but the right never accrues unless (1) the party dies of his injuries, and (2) the deceased never commenced any action during his life-time: *Taylor's Estate*, 179 Pa. 254 (1897). The doctrine is that the cause of action merges entirely in the survivor. If he compounds it or brings a suit to a finish, no further remedy can be had under the statute. If he commences the suit, and dies before any conclusion, the statute prevents the suit from abating. If he dies and has made no attempt to sue, then an entirely "new remedy" springs into existence by section 19 of the Act of 1851. But, as Green, J., said in *Hill v. P. R. R.*, 178 Pa. 223 (1896), "it cannot be argued that it was the intention to give one right of action to the party injured, and another and *independent* right of action for the same injury to the widow." The Act of 1855 does not create any new and independent right, either. It merely extends the number of persons who may sue. The idea that no separate action accrues is laid down in *Taylor's Estate* (*supra*). There, a guardian was prevented from suing under the statute, because the deceased had commenced suit and, after her death, her administrators had made a compromise with the railroad who were the defendant. But there can be no doubt that the death of the party gives the widow under the 19th section of the Act of 1851, a new cause of action. In *Gross v. Traction Co.*, 180 Pa. 99 (1887), the plaintiff married the deceased after his injury was sustained: at the trial, she was allowed to recover because the cause of action was the death of her husband, not the injury. In conclusion, it may be said, that this doctrine of a separate cause of action is only important in Pennsylvania as giving a new measure for damages, the reasonable expectation of pecuniary advantage: *Shuatz v. R. R.*, 160 Pa. 602 (1894); but we feel sure that no widow can recover where her husband, had he survived, could not have recovered.

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CORPORATIONS; ULTRA VIRES; POWER OF A CORPORATION TO HOLD STOCK IN ANOTHER CORPORATION. It has been recently decided in the case of the *First National Bank of Concord, N. H.*, v. *Hawkins* (May 15, 1899), 19 Supreme Court Reporter (U. S.), 739, that a national bank which purchased and held as an investment certain shares of stock in a second national bank, and received dividends thereon, is not thereby estopped to plead the unlawfulness of its action in defence to a suit by the receiver of the

second bank after its insolvency to collect an assessment made on the shareholders by the comptroller. The questions which seem to be presented by this case are twofold: 1. Can a corporation acquire and hold the stock of another corporation as an investment? 2. Supposing that it cannot, the question presents itself, can a corporation, having purchased such stock of another corporation, be estopped to deny its liability as an apparent stockholder after it has received the benefits accruing from such holding?

The modern English and American doctrines on the first question may be briefly stated, as follows: That a corporation has no power to acquire and hold stock in another corporation unless such power is expressly conferred, or unless the investing in the stock of another corporation is contrary to the nature of the business for which it was created. This rule is well settled and admits of little or no discussion. In the opinion by Mr. Justice Shiras in this case he refers briefly to Section 5136 of the Revised Statutes, in which the powers of a national bank are set forth and among which the power to hold stock in another national bank, or, in fact, any other corporation of any description is not included. In construing this section he refers to the case of the *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U. S. 122 (1875), in which it was said that "dealing in stocks is not expressly prohibited, but such prohibition is implied from the failure to grant the power." This interpretation had been previously decided in this court: *Pearce v. Mad. & Ind. R. R.*, 21 How. 442 (1858); *Bank of Augusta v. Earle*, 13 Pet. 587 (1839); *Perrine v. Ches. & Del. Canal Co.*, 9 How. 184 (1850).

It being admitted, and it is undoubtedly true, that this construction is correct, it naturally follows that the subscription by the plaintiff bank to the stock of the insolvent bank was prohibited by the act of incorporation, if not expressly, at least by implication, and was void. The argument advanced by Boynton, J., in *Franklin Bank v. Commercial Bank*, 36 Ohio St. 355 (1881), seems conclusive. He continues, after stating the general rule, as follows: "Were this not so, one corporation by buying up the majority of the shares of another corporation could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry one. A banking corporation could become the operator of a railroad or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining control of the bank's stock." Thus it might be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. It might destroy all competition by destroying its rivals and wiping them out of existence. On this question the court was certainly correct in deciding such purchase *ultra vires*.

The second part of the decision is that a corporation, having committed such unlawful act and reaped its rewards, can, when asked to assume a liability which it is only fair it should be pre-

sumed to have accepted as indispensable to its holding, set up as a defence to a suit to enforce such liability the *ultra vires* of its acquisition.

It has been recently decided that, as incidental to the power to loan money on personal security, a bank may, in the usual course of its business, accept stock of another corporation as collateral security, and by an enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders: *Bank v. Kennedy*, 167 U. S. 362 (1896). Now if this case be correctly decided it is hard to distinguish between it and the case under discussion. If, as has been said, a corporation may be held liable when it acquires stock in the usual course of its business, why should it not be held liable when it acquires it by a voluntary act on its part? There seems to be no doubt as to the *ultra vires* of such act, but should it be allowed to set this up as a defence when it has reaped for years the fruits of such illegal act? May a person accept all the profits and escape all the liabilities for loss? It would seem that such ought not to be the rule, and this view was taken by Mr. Justice Strong in *National Bank v. Case*, 99 U. S. 628 (1878), in which case he says: "There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But even if there were, the lender could not set up its own violation of the law to escape the responsibility resulting from its illegal action." This, though a dictum, was followed in effect in the case of the *Citizens' State Bank v. Hawkins*, 71 Fed. 369 (1896).

In *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378 (1855), the court, after examining a number of authorities, concludes the opinion thus: "It ill becomes the defendant to borrow from the plaintiff for a single day a sum of money to relieve their immediate necessities and then to turn around and say: 'I will not return this money because you had no power by your charter to loan it.'"

So, also, was it held in *Wright v. Antwerp Pipe Line*, 101 Pa. 204 (1884), where a corporation, although prohibited by its charter, entered into a contract for the purchase of stock in another corporation, and the contract was executed by the delivery of the stock that it may not plead in defence to a suit on a promissory note given in payment for the price of the stock, and in the hands of a purchaser for value, that the contract was *ultra vires*.

The cases above cited are only a few of many which hold that the defence of *ultra vires* by a corporation, which has recovered the profits of the transaction, is insufficient and will not be supported. And this view is certainly the more equitable and, in common justice, the only just conclusion which can be reached, and it is submitted that the decision of the Supreme Court in this case reversing the judgment of the Circuit Court of Appeals in favor of the receiver of the insolvent bank was erroneous.



**EVIDENCE ; ORAL AGREEMENT VARYING CONTRACT OF ENDORSEMENT :** *Bank of Washington v. Ferguson*, 59 N.Y. Suppl. This case is the latest of a long series of decisions upon this question. In spite of some conflict, the general principle seems to be that the contract of endorsement may not be varied by parol. Here Ferguson was the last endorser upon two promissory notes, drawn by the Arkell Company, and by it endorsed. The notes were also endorsed by W. J. & J. Arkell. Defendant had the notes discounted by the plaintiff bank, of which he was vice-president. The proceeds were credited to his use and were utilized by him, part only being handed to Arkell Company. Ferguson's main defence to the action was that he was accommodation endorser, and that, at the time of the endorsement, it was orally agreed that he should be liable only for the balance of the amount named in the notes after certain collaterals had been applied and all remedies against the maker exhausted. In refusing to allow the defence, the court said: "The defence pleaded is inherently bad. The defendant's accommodation endorsement was a written contract to which the law has given a definite character. . . . He now pleads that the written agreement was not the real agreement. . . . Thus he distinctly seeks to qualify his written obligation. Parol evidence, tending in this direction, is as clearly inadmissible in a contract of endorsement, accommodation or otherwise, as in the case of any other written agreement."

The decision in the *Susquehanna Bridge Company v. Evans*, 4 Wash. (U. S. C. C.), 480 (1829), went the other way in a similar state of facts. Mr. Justice Washington allowed an endorser to show a parol agreement that the endorsees should charge the maker, on the ground that "the reasons which forbid the admission of parol evidence to alter or explain written instruments do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the endorsement of a note." In *Dale v. Gear*, 38 Conn. 486, on the other hand, it was said "the contract of endorsement is implied by law as clearly and as perfectly from the blank endorsement of a negotiable note as if written out in full when endorsed. And if, as between the original parties, there is any equity existing dehors the instrument, which should prevent the endorsee from enforcing the contract, it must be set up as an equity, provable in equity, to bar an apparent legal liability. . . . And it *cannot* be shown because the rule of evidence to which we allude is not applicable."

These statements, though not made with reference to the *Susquehanna Bridge* case (which was not noticed), are quite applicable, and clearly show the weakness of Mr. Justice Washington's decision. But that even the Connecticut courts themselves have not always been consistent on the subject is evident from the early case of *Smith v. Barber*, 1 Rort. 207, where the court distinctly held an opinion contrary to the decision in *Dale v. Gear*.

It seems quite a favorite statement with the text-book writers



to declare that the law of Pennsylvania especially is anomalous and out of accord with that of the rest of the country upon this question. They cite various cases in support of their propositions, but there are three in particular upon which nearly all unite: *Hill v. Ely*, 5 S. & R. 363; *Patterson v. Todd*, 18 Pa. 426, and *Ross v. Espey*, 66 Pa. 481. Upon a close examination of these cases, however, they do not lend that degree of support to the statement which one might reasonably expect from their popularity with those who cite them.

In *Hill v. Ely* the defendant purchased coffee of the plaintiff, giving in payment the notes of a third person upon express agreement that no liability should attach to the defendant. The notes were handed to plaintiff without endorsement, but he was afterwards induced to endorse the notes, the plaintiff saying he wished it merely for convenience in collection. The court admitted evidence of this agreement, but only upon the ground that the plaintiff was guilty of fraud in obtaining or using the endorsement. It was said that, as this parol evidence would be received in chancery to reach the fraud, it would also (on account of the constitution of the Pennsylvania courts) be received in their courts of law. It was expressly stated that the evidence was not received to contradict the written agreement.

In *Patterson v. Todd* a note was endorsed by the payee when overdue, and the main question was whether there should have been subsequent demand and notice. The court decided that demand and notice, within a reasonable time, were necessary. Incidentally, it not being necessary for the decision of the case, the court said that the defendant might show, by parol evidence, that he said he would not warrant the notes. But this was a mere dictum, possibly thrown off by the court in an unguarded moment. The question was not directly raised by the facts, nor was it argued by counsel. And whatever respect we may feel for the court, it is important not to attach too much weight to chance sayings such as this.

In the third Pennsylvania case, *Ross v. Espey*, the court allowed the second endorser in an action against him for the full amount of the note, by the third endorser, who had paid the note, to show that there was an agreement between the two endorsers, that in case of failure by the maker to pay they should be jointly liable. The facts were almost identical with those in *Philipps v. Preston*, 5 Howard, 278, and the decision was the same. But neither of these cases affirms the proposition that parol evidence is admissible to vary the endorsement. There was no pretense of grounding the suit upon the notes or the endorsements upon them. Both actions were grounded upon the collateral agreement, *i. e.*, that they should be jointly liable. This was a good parol contract, the consideration upon each side being the promise emanating from the other side. The evidence, being offered only to prove this separate parol contract, was of as high a character as the law demands in such cases and was rightly admitted.

A few of the principal dissenting cases have been briefly discussed. In affirmance of the principle there are very many cases, all embodying facts and decisions so nearly identical, that the mention of a few will suffice for all.

*Wright v. Morse*, 9 Gray, 337. Parol evidence is inadmissible even between the original parties to a note to show that a person, whose name is signed upon the back of a note, signed it as guarantor or upon a condition not performed.

*Bigelow v. Coton*, 13 Gray, 309. One who puts his name before delivery on the back of a promissory note, payable to maker or order and endorsed by maker, is an endorser and not a joint maker, and his liability cannot be varied by parol evidence.

*Bank of U. S. v. Dunn*, 6 Peters, 51. The defendant was not allowed to show an agreement that he should not be liable upon his endorsement.

*Specht v. Howard*, 16 Wallace, 564. The court would not allow evidence of an agreement that payment should be demanded in a certain place. It was only through accident that the agreement was not written. But it could not be shown, because it tended to vary the absolute terms of the written contract.

These are typical of the great number of cases again and again affirming the point until Parsons feels justified in saying . . . "it is a firmly-established principle that parol evidence of an oral agreement alleged to have been made at the time of drawing, making or endorsing a bill or note cannot be permitted to vary, qualify, contradict, add to or subtract from the absolute terms of the written contract."

## BOOK REVIEWS.

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**THE ANNOTATED CORPORATION LAWS OF ALL THE STATES.** Compiled and Edited by ROBERT C. CUMMING, FRANK P. GILBERT and HENRY L. WOODWARD. Albany: J. B. Lyon Company. 1899.

It has become customary for persons living in one jurisdiction to avail themselves of the privileges of association conferred by the corporation laws of some other. Indeed, the states of the Union may be divided roughly into classes with reference to the policy manifested by their legislation dealing with corporate organization. Some of the states (as for example, Delaware, New Jersey and West Virginia) are well known as states which invite the organization under their laws of corporations whose promoters intend to do business in jurisdictions other than that in which the charter is granted. Every day experience teaches a practicing lawyer the importance of having at hand the means of obtaining reliable information about the corporation laws of states other than his own. The compilers of the volumes under examination have undertaken to supply this want. The result is that their publishers are able to offer to the profession an extremely useful compilation. In addition to the general corporation statutes of the several states, the editors have included in their work the provisions of state constitutions and statutory enactments bearing upon receiverships, proceedings in *quo warranto*, status of claims for wages, factory and police regulations, taxation, procedure in actions by and against corporations and trusts and combinations for the regulation of trade. The editors have wisely refrained from attempting to frame compendious statements of the effect of statutes and have, instead, followed the safer plan of giving to the reader the language of the statutes themselves. No attempt has been made to include statutes applicable exclusively to special classes of corporations. It was probably found impossible to include all this matter. At the same time it must be admitted that the omission of such statutory provisions has tended to lessen the value of the work as a book of reference. This is, perhaps, especially true in the case of Pennsylvania legislation, for in that state the general treatment of corporations is fragmentary and unsatisfactory, and many of the most important acts are those which relate exclusively to certain of the more important classes of bodies corporate. The notes of decisions in construction of statutes are most useful. The reviewer has satisfactorily tested the accuracy of them in a number of typical instances. An index to the legislation of each state follows immediately after the statutes themselves. By an ingenious device, consisting of a page of heavy,

colored paper before and after the portions of the work devoted to each state, the several portions are separated one from another and the entire work has the effect of a series of pamphlets bound together in volumes, an arrangement which greatly facilitates the labor of reference. There seems to be no reason to doubt that this collection of statutes will become very popular with the profession.

*G. W. P.*

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MONOPOLIES AND THE PEOPLE. By CHARLES WHITING BAKER, C. E. New York: G. P. Putnam's Sons. 1899.

The problems presented by the formation of great combinations of capital, commonly designated as trusts, are among the foremost in the eyes of the public at the present time. The possibility, and even probability, that the control of trusts may become an important political question in the near future, makes any book which deals with the question in a practical, common-sense manner, from an impartial point of view, very welcome.

Such a book is "Monopolies and the People," by Mr. C. W. Baker. This work was first published ten years ago. The present edition (the third) has been thoroughly revised, and a number of chapters added under the general title of "A Decade of Progress toward the Death of Competition." These closing chapters bring the statistics and history of the trust movement down to the present year.

The first portion of this book is devoted to a brief, but remarkably clear statement of the arguments usually advanced for and against the substitution of some form of combination for the former system of industry based on free competition. Then follows a description of the history and development of the monopolies in the several great branches of commerce; *e. g.*, in mineral wealth, in transportation, in trade, and in the labor market. The chapter on the latter subject is of especial interest because in it Mr. Baker points out what is seldom realized: the tendency towards the elimination of competition among wage-earners in many branches of trade. But we feel that the author has overestimated the strength of the trade unions, as for instance where, in speaking of the Burlington R. R. strike of 1888, he claims that the engineers might have secured their demands and more, and only refrained from so doing because of their good sense and honesty.

In his closing chapters the writer sets forth briefly the remedies for the difficulties set forth in the first part of the book. He realizes that the era of free competition has past, and that combinations are an inevitable outcome of present economic conditions. Assuming, therefore, that trusts have come to stay, he points out how he would endeavor to secure the benefits of them to the consumer. Thus, for instance, he advocates not the prohibition of railroad "pooling," but regulation of the railroads by the state by means

of government directors on their boards. Again, in the case of municipal monopolies, he recommends that the cities should undertake the operation of such *quasi* public corporations as gas works and street railways.

As to trusts in general, Mr. Baker believes that many of their harmful results could be obviated by (1) the securing of legislation which would place the granting of charters to them in the hands of Congress, and not in the states; (2) the adoption of a system by which the accounts of all trusts should be made public; and the placing of government directors to represent the interests of the people on the boards of directors of all trusts.

While we cannot agree with the advisability of adopting certain of these remedies, still they are as the suggestions of a practical business man worthy of earnest thought.

Mr. Baker's book is not a legal discussion of the subject. The question of modern trusts is considered from the standpoint of a business man and student of economics, not from the point of view of a lawyer. However, to any student of public affairs, it is a work full of valuable material and helpful suggestion.

R. D. J.

REVIEW OF THE CONSTITUTION OF THE UNITED STATES. By W. G. BULLITT. Cincinnati: The Robert Clarke Company. 1899.

Such a small treatise attempting to go into principles, already so voluminously treated by so many eminent men, seems to us at first blush a rather bold, and, perhaps, unsuccessful effort. Such was our first impression until we had given Mr. Bullitt's work a more thorough inspection, and noted, with some surprise, the amount of truly scholarly work and research he had managed to condense into one small volume.

The pivotal point upon which this work swings and which its author so fondly defends in the face of a continually decreasing belief among *younger* members of the bar, is a power inherent in the *people* and the duty of the states to watch their rights closely and prevent a gradual absorption of powers where only certain ones are delegated by the Federal Government.

To fully sustain this point, and right successfully is it done, the author finds it necessary to trace certain principles found in our present government from their earliest infancy among our Anglo-Saxon ancestors.

Skillfully and rapidly he depicts the representative theory in the Anglo-Saxon family, husband representing all its members in the different gemots or gatherings, then down through English history until our own Articles of Confederation are drawn up and adopted. Here again our attention is forcibly called to the power of the people in that clause so familiar to us all, "each state retains its sover-

eighty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled." Later we are reminded that the object of the Constitutional Convention is to *amend* the Articles of Confederation; "not to do away with the old law, but to amend it so as to make it meet the needs and exigencies of the government."

This argument, historically produced up to this point, holds us by its precise neatness and overwhelming truth. From here the author plunges into the Constitution, and, seizing upon certain decisions, acts and precedents, shows us just how and where this reserve power left in the states has been curtailed and intrenched upon. A notable instance of this is his criticism of the case of *In re Neagle*, where, in speaking of the President's right to protect Justice Field when in the State of California, he says: "The claim that Neagle was obeying orders of the President in going with Justice Field to protect him, concedes that he was in the act of violating that provision of the Constitution that requires the United States to guarantee to the *states* republican forms of government and the exercise of their *police power*."

Another topic in this work, which lack of space does not permit us to treat more fully, is its discussion of prohibition against admitting states remotely separated from the union, the prohibition against buying or selling the sovereign title to territory and its inhabitants.

It is, however, with unusual force of argument and clear diction that an attack is justly made upon the Fifteenth Amendment, now so firmly imbedded in our Constitution, and which, although we may doubt the wisdom of, we cannot controvert. The arguments here, as elsewhere, are such that one, firmly opposed to the assertion, can find no flaw in the reasoning.

On the whole, we think that after a careful study of the recognized standard works on the Constitution we could recommend no work better adapted than Mr. Bullitt's for the broadening and dilating of ideas already gained, and enlarging the scope of the grasp on the questions it considers.

T. C.

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FIRST STEPS IN INTERNATIONAL LAW. By SIR SHERSTON BAKER, Bart. Boston: Little, Brown & Co. 1899.

The recent war between the United States and Spain raised many questions of international law, which, owing to the vast commerce of the former nation were of peculiar interest to the people of England and the United States in particular, and it was owing to this that the present volume was given to the public.

The author in his preface clearly states that his purpose in writing was to present "a manual of international law, written in easy language and not too large a volume, which might meet with

the approbation of the public and supply a want to students." We think he has fully attained his end. There are, indeed, many works on international law, but they are designed only for those who are well versed in the subject, and are entirely beyond the reach of those who don't propose to make it a life-study. To the general public, and even to students, international law has but a vague significance. Based as it is upon ever-varying customs and elusive precedents, the average person has great difficulty in ascertaining the underlying principles of this great system.

Sir Sherston Baker has removed all this difficulty by writing the present volume. While its pretensions are small and its author disavows any intention to give to the public a voluminous work, still we must call attention to the vast amount of learning and careful research which he displays in its make up.

The book opens with a very interesting and instructive historical sketch of the subject wherein the laws of nations are traced from their earliest beginnings among the Jews, the Greeks and Romans through eleven distinct periods to the present day.

The nature and sources of international law are then taken up and ably discussed. He treats of in turn the rights of nations, and finally details the usages of states in their intercourse with one another. Every phase of the subject is treated in a plain and concise style, and in the appendix is inserted a digest of the more important cases for those who are inclined to look for the authority for statements made in the course of the work.

The volume, we think, is very meritorious, and, no doubt, will prove of great value to the general public and to students. It is, moreover, gotten up in first-class style, being well indexed, and should prove invaluable as a book of ready reference to those who are but rarely engaged in dealing with international questions.

*M. H.*

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**A TRUSTEE'S HANDBOOK.** BY AUGUSTUS PEABODY LORING, of the Suffolk Bar. Boston: Little, Brown & Company. 1898.

We particularly recommend this little book to any one who finds himself called upon to undertake the duties of a trustee. So far as we are informed it is the only complete work of its kind, and one could not wish for a clearer or more concise statement of the practical rules governing the relation of trustee and beneficiary. There is here no exhaustive discussion of legal principles, or long citation of conflicting decisions; for these the reader is referred to the standard text-books on the subject. One leading and illustrative case is cited with each settled principle laid down, while where decisions are in conflict, that fact is noted, and one or two of the leading decisions on each side are mentioned. Where rules are dependent upon statute, a brief abstract is given for each state; the general application of the work is thus apparent. It is, per-



haps, not too much to say that the book contains practically everything a trustee is ordinarily required to know.

The general practitioner will also find the work valuable as presenting in a few pages a complete working outline of a very practical subject. There is a very complete index and a table of cases.

*C. H. H.*

**BRYANT'S CODE PLEADING.** Second Edition. Boston: Little, Brown and Company. 1899.

This work will doubtless prove invaluable to a great many lawyers and students in the United States to-day, for twenty-seven states and territories have now adopted Code Pleading. New York was the first, we believe, to do this and about one-half of the states and territories, notably California, Connecticut, Indiana and Ohio, followed suit at a later date. The scope of the work and its novelty are well gleaned from the author's preface. The work contains "the combination of a condensed summary of the common law rules of pleading, an outline of the equity system of pleading and a general statement of the code system as now established by statute and interpretation. Add to this a chapter on the civil law system of pleading, a good general index and "an analytical index of the code provisions relating to pleading in the twenty-seven code states and territories," and we have a work well worthy of the author, who is Dean of the Law School of the University of Wisconsin. Typographically the work is good; the print is always clear, though rather fine at times.

*J. M. D.*

**GENERAL DIGEST, AMERICAN AND ENGLISH.** Vol. VI. New Series. Rochester, N. Y.: Lawyers' Co-operative Publishing Co. 1899.

At last we have a digest where not only are gathered the digested decisions from *all* American courts, federal and state, and intermediate as far as reported, but higher courts of England and Canada, with frequent citations from leading text-books.

In fact, in this series the publishers have offered us works complete in every way.

While regretting that lack of space forbids us to go into the merits of this digest more elaborately, we can, at least, heartily recommend it to the profession.

**PROBATE REPORTS ANNOTATED,** Vol. III. By FRANK S. RICE. New York: Baker, Voorhis & Co. 1899.

The fact that during every generation four-fifths of the entire real and personal property of seventy millions of people passes

under the absolute control of the probate jurisdictions of this country is sufficient excuse for a far more superior publication on this subject even in this age of publications. But when we are aided in our research by an effort like Mr. Rice's we feel grateful indeed. These reports have condensed work which many precious hours would be consumed in looking up. Even in this 19th Century, remarkable for condensed material, we readily find place for such works.

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AMERICAN PRACTICE REPORTS. Vol. I. Edited by CHARLES A. RAY, LL.D. Washington Law Book Co. 1899.

These reports, which are meant to shorten the arduous labor of looking up many cases on small points in procedure, should be almost invaluable to the active practitioner. They are arranged to appear by advanced parts, thus being strictly up to date.

The arrangement by states, so that it is easy to find the law of a given jurisdiction in a short time, is most convenient. In this series Judge Ray and his associates are materially aiding the actual struggles of the practice of the law for the legal fraternity.

*T. C.*

## BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked \* will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

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**POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE.**  
Edited by JOHN CUTLER. London : Butterworth & Co. 1898.

**THE LAW OF DEBTOR AND CREDITOR.** By RUFUS WAPLES. Chicago :  
T. H. Flood & Co. 1898.

**EXPERIENCE IN THE UNITED STATES SUPREME COURT.** By A. H.  
GARLAND. Washington, D. C. : John Byrne & Co. 1898.

**THE ELEMENTS OF MERCANTILE LAW.** By T. M. STEVENS. London :  
Butterworth & Co. 1898.

**HISTORY OF THE LAW OF REAL PROPERTY.** By KENELM EDWARD  
DIGBY. Fifth Edition. Oxford Press, London and New York :  
Henry Frowde. 1897.

**THE FEDERAL COURTS.** By CHARLES H. SIMONTON. Richmond, Va. :  
B. F. Johnson Publishing Co. 1898.

**COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS.** Vol. VII.  
By SEYMOUR THOMPSON, LL.D. San Francisco : Bancroft-Whitney  
Co. 1899.

**GREENLEAF'S TREATISE ON THE LAW OF EVIDENCE.** Vol. I. Edited  
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